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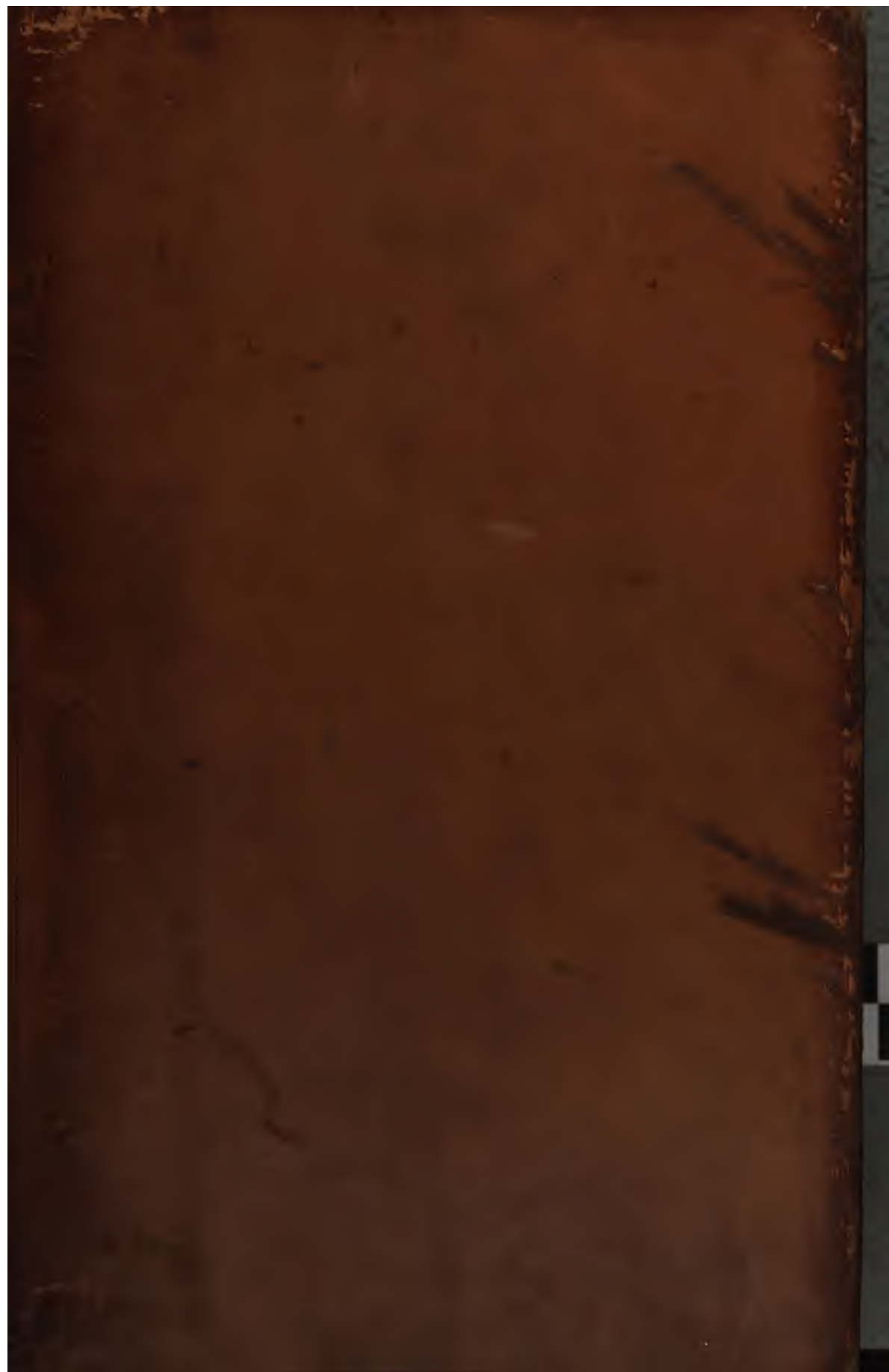
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

IN

HILARY, EASTER, AND TRINITY
TERMS,

IN THE FOURTH YEAR OF WILL. IV.



BY

SANDFORD NEVILE, Esq. OF THE INNER TEMPLE,

AND

WILLIAM M. MANNING, Esq. OF LINCOLN'S INN,

BARRISTERS AT LAW.



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J U D G E S
OF THE
C O U R T O F K I N G ' S B E N C H ,

During the period comprised in this volume.



THOMAS Lord DENMAN, C. J.

Sir JOSEPH LITLEDALE, Knt.

Sir JAMES PARKE, Knt.

Sir WILLIAM ELIAS TAUNTON, Knt.

Sir JOHN PATTESON, Knt.

Sir JOHN WILLIAMS, Knt.

**N. B.—PARKE, J. sat in the Bail Court in
Hilary Term, TAUNTON, J. in Easter Term,
and PATTESON, J. in Trinity Term.**



ATTORNEYS-GENERAL.

Sir WILLIAM HORNE, Knt.

Sir JOHN CAMPBELL, Knt.

SOLICITORS-GENERAL.

Sir JOHN CAMPBELL, Knt.

Sir CHARLES CHRISTOPHER PEPYS, Knt.

A

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
HILARY TERM,
IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

REGULÆ GENERALES,

Made pursuant to Statute 3 & 4 *Will. 4*, c. 42, s. 1 ;—presented
to Parliament, 5th February, 1834.

Hilary Term, 4th William 4.—1834.

1834.

WHEREAS it is provided by the stat. 3 & 4 *Will. 4*, c. 42, s. 1, That the Judges of the Superior Courts of Common Law at Westminster, or any eight or more of them, of whom the chiefs of each of the said Courts should be three, should and might by any Rule or Order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said Courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which Rules, Orders, and Regulations, were to be laid before both Houses of Parliament, as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both Houses of Parliament, but, after that time, should be binding and obligatory on the said Courts, and all other Courts of Common Law, and be of the like force and effect, as if the provisions contained therein had been expressly enacted by parliament.

**REGULÆ
GENERALES.**
Recital of au-
thority to alter
mode of plead-
ing, &c.

1834.

REGULÆ
GENERALES.

Provided that no such Rule or Order should have the effect of depriving any person of the power of pleading the general issue, and of giving the ~~special matter~~ in evidence in any case wherein he then was, or thereafter should be entitled so to do by virtue of any act of parliament then or thereafter to be in force.

IT IS THEREFORE ORDERED, That from and after the first day of Easter Term next inclusive, unless parliament shall in the meantime otherwise enact, the following Rules and Regulations, made pursuant to the said statute, shall be in force:—

FIRST—GENERAL RULES AND REGULATIONS.

Title of plead-
ing and date of
entry.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every declaration, and other pleading, shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

Continuances
abolished except
upon jury pro-
cess.

2. No entry of continuances by way of imparlance, *curia advi- sari vult, vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained.

Provided that such Regulation shall not alter or affect any exist- ing rules of practice, as to the times of proceeding in the cause.

Puis darrein
continuance.

Provided also, that in all cases in which a plea *puis darrein continuance*, is now by law pleadable, in Banc or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Accompanying
affidavit.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a Judge shall otherwise order.

Date of entry
of judgment.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Nunc pro tunc.

Provided that it shall be competent for the Court, or a Judge, to order a judgment to be entered *nunc pro tunc*.

Warrant of
attorney.

4. No entry shall be made on record of any warrants of attor- ney to sue or defend.

Recital of ex-
tended powers
of amendment
under 3 and 4
Will. 4, c. 42,
s. 23.

5. And whereas, by the mode of pleading hereinafter pre- scribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respec- tive parties, more distinctly than heretofore; and by the said act of the 3 & 4 Will. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged; several counts shall not

be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each, nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore counts, founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Ex. gr. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract for sale for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

So counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro rata itineris*, upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed.

In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts, founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass for acts committed at the same time and place are not to be allowed.

Where several debts are alleged in *indebitatus assumpsit* to be due in respect to several matters—*ex. gr.* for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it

1834.

REGULÆ GENERALIÆ.

Several counts or pleas, &c., on one and the same matter.

Contract conditional or absolute.

Special and general sale and delivery.

Special and general bargain and sale.

Counts on bill or note, and also on consideration, allowed.

Policy of insurance.

Charter-party.

Pro rata itineris.

Rent, and use and occupation, Misfeasance.

Nonfeasance.

Trespass.

What shall amount to a several *indebitatus* count.

Account stated.

1834.

REGULÆ
GÉNÉRALES.

Several
breaches.

Solvit ad, et
post diem.

Payment, with
accord or re-
lease.
Guarantee of
A. B. or of C. D.

Agreement to
forbear or to
discharge.

Common per
totum annum,
or limited.

Variation of
termini of way.

Avowry for rent
and for damage
feasant.

Variation as to
reservation.

Course of pro-
ceeding in order
to enforce ob-
servance of rule.

may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts, is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count.

Ex. gr. Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the rule,) are not to be allowed.

Pleas of *solvit ad diem* and of *solvit post diem* are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct, and to be allowed.

But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there, pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples in this and other places specified, are given as some instances only of the application of the Rules to which they relate, but the principles contained in the Rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance shall have been used in apparent violation of the preceding Rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the Rule, be struck out at the cost of the party pleading, whereupon

the Judge shall order accordingly, unless he shall be satisfied, upon cause shown, that some distinct subject-matter of complaint is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed.

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7. Upon the trial where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a Judge has been made under the preceding Rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance, with respect to which the Judge shall so certify.

Costs of pleadings and evidence.

8. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Venue.

Provided, that in cases where local description is now required, such local description shall be given.

Local description.

9. In a plea or subsequent pleading intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment, nor shall it be necessary in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the

Commencement and prayer of judgment.

1834. whole action. Provided, that nothing herein contained shall extend to cases where an estoppel is pleaded.
- RÈGULE GÉNÉRALES.** 10. No formal defence shall be required in a plea, and it shall commence as follows :
- Defence.** The said defendant by his attorney [or, "in person," &c.] says, that .
- Leave of Court to plead several matters.** 11. It shall not be necessary to state in a second or other plea of avowry, that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.
- Protestation.** 12. No protestation shall hereafter be made in any pleading, but either party shall be entitled to the same advantage in that, or other actions, as if a protestation had been made.
- Traverses.** 13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.
Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial.
- Demurrer.** 14. The form of a demurrer shall be as follows :
The said defendant, by his attorney [or, "in person," &c. or, "plaintiff"] says that the declaration, [or, "plea," &c.] is not sufficient in law ;—showing the special causes of demurrer, if any.
- Joinder.** The form of a joinder in demurrer shall be as follows :
The said plaintiff, [or, "defendant"] says that the declaration [or, "plea," &c.] is sufficient in law.
- Entry of pleadings.** 15. The entry of proceedings on the record for trial, or on the judgment roll, (according to the nature of the case,) shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.
- Fees on issues.** 16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the assizes, or any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.
- Payment of money into Court.** 17. When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis* :
C. D. } The day of
ats. } The defendant by his attorney,
A. B. } [or, "in person," &c.] says, that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of £ ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages [or, in actions of debt, "that he is not indebted to the plaintiff"] to a greater amount than the said sum, &c. in respect of the cause of action in the declaration mentioned, and this he is ready to verify ; wherefore he prays judgment if the plaintiff ought further to maintain his action.
- Receipt by officer.** 18. No Rule or Judge's order to pay money into Court shall be necessary, except under the 3 & 4 Will. 4, c. 42, s. 21, but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

19. The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply "that he has sustained damages, [or, 'that the defendant is indebted to him,' as the case may be,] to a greater amount than the said sum," and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

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Replication to
plea of payment
of money into
Court.

20. In all cases under the 3 & 4 Will. 4, c. 42, s. 10, in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:

Nonjoinder.

(*Venue*)—A. B., by E. F. his attorney, [or, "in his own proper person," &c.] complains of C. D. and G. H. who have been summoned to answer the said A. B., and which C. D. has heretofore pleaded in abatement the non-joinder of the said G. H. &c. (The same form to be used *mutatis mutandis* in cases of arrest or detainer.)

21. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

Derivative title
to be specially
denied.

PLEADINGS IN PARTICULAR ACTIONS.

I. ASSUMPSIT.

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Plea of non
assumpsit.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Examples of
operation of
several pleas.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

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Non assumpsit
inadmissible
upon bills and
notes.

Matters in
avoidance of
action to be
specially
pleaded.

Averment of
interest in
policy.

In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; e. g. the drawing or making, or indorsing, or accepting, or presenting, or notice of dishonour, of the bill or note.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

4. In actions on policies of assurance, the interest of the assured may be averred thus:—"That A., B., C. and D. or some or one of them, were or was interested, &c.;" and it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."

II. IN COVENANT AND DEBT.

Non est factum.

1. In debt on specialty, or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

Nil debet.

2. The plea of *nil debet* shall not be allowed in any action.

Nunquam indebitatus.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

Traverse, or avoidance.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III. DETINET.

Non detinet.

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's pro-

perty therein; and no other defence than such denial shall be admissible under that plea.

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IV. IN CASE.

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Not guilty, in case.

Ex. gr. In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house; and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way. And in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff, or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

Nuisance.

Obstruction.

Conversion.

Slander.

Escape.

Carrier.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

Matters in avoidance.

V. IN TRESPASS.

1. In actions of trespass *quare clausum fregit*, the close or place in which &c. must be designated in the declaration by name or abutments, or other description, in failure whereof the defendant may demur specially.

Name or abutments of close.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

Not guilty, in clausum fregit.

3. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

Not guilty, in bonis asportatis.

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Right of way.

4. Where in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of way so found, and for the plaintiff, in respect of such of the trespasses as shall not be so justified.

Common of
pasture.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

Distributive
construction.

6. And in all actions in which such right of way or common as aforesaid, or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Exception as to
pleadings upon
declarations
anterior to
Easter Term.

Provided nevertheless, that nothing contained in the 5th, 6th, or 7th, of the above-mentioned General Rules and Regulations, or in any of the above-mentioned Rules or Regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of Easter Term next.

ISSUES, JUDGMENTS, and other PROCEEDINGS, in Actions commenced by process under 2 Wm. IV. c. 39, shall be in the several forms in the Schedule hereunto annexed, or to the like effect, *mutatis mutandis*. Provided, that in case of non-compliance, the Court or Judge may give leave to amend.

No. 1.

Form of an Issue in the King's Bench, Common Pleas, or Exchequer.

In the King's Bench; or,
In the Common Pleas; or,
In the Exchequer.

The [date of declaration] day of _____ in the
year of our Lord 18 _____

VENUE.—A. B. by E. F., his attorney, [or, in his own proper person, or by E. F., who is admitted by the court here to prosecute for the said A. B., who is an infant within the age of 21 years, as the next friend of the said A. B., as the case may be,] complains of C. D., who has been summoned to answer the said A. B. [or, arrested or detained in custody,] by virtue [or, served with a copy, as the case may be,] of a writ issued on [date of first writ,] the day of _____ in the year of our Lord 18 _____ out of the Court of our Lord the King, before the King himself at Westminster, [or, out of the Court of our Lord the King, before his Justices at Westminster, or, out of the Court of our Lord the King, before the Barons of his Exchequer at Westminster, as the case may be.] For that

[Copy the declaration from those words to the end, and the plea and subsequent pleadings to the joinder of issue.]

HILARY TERM, IV WILL. IV.

11

Thereupon the sheriff is commanded that he cause to come here on the day of twelve &c., by whom &c., and who neither &c., to recognise &c., because as well &c.

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RECTOR
GENERALIS.

No. 2.

Form of Nisi Prius Record in the King's Bench, Common Pleas, or Eschequer.

[The placita are to be omitted.—Copy the issue to the end of the award of the venire, and proceed as follows:]

Afterwards on the [teste of distringas or habeas corpora,] day of in the year the jury between the parties aforesaid is respited here until the [return day of distringas or habeas corpora,] day of unless shall first come on the [first day of sittings or commission day of assizes,] day of at according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors accordingly.

[The postea is to be in the usual form.]

No. 3.

Form of Judgment for the Plaintiff in Assumpsit.

[Copy the issue to the end of the award of the venire, and proceed as follows:]

Afterwards the Jury between the parties is respited until the [return of distringas or habeas corpora,] day of unless shall first come on the [day of sittings or Nisi Prius,] day of at according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.

Afterwards on the [day of signing final judgment,] day of come the parties aforesaid, by their respective attorneys aforesaid, [or, as the case may be,] and before whom the said issue was tried, hath sent hither his record had before him in these words:

[Copy postea.]

Therefore it is considered that the said A. B. do recover against the said C. D. his said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed; and also £ for his costs and charges by the Court here adjudged of increase to the said A. B. with his assent; which said damages, costs, and charges, in the whole, amount to £ , and the said C. D. in mercy, &c.

No. 4.

Form of the Issue when it is directed to be tried by the Sheriff.

[After the joinder of issue proceed as follows:]

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed £20, hereupon on the [teste of writ of trial] day of in the year pursuant to the statute in that case made and provided, the sheriff [or, the judge of being a court of record for the recovery of debt in the said county, as the case may be.] is commanded that he summon twelve &c., who neither &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly, and when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our Lord the King, to him in that behalf directed, with the finding of the jury thereon indorsed on the day of , &c.

No. 5.

Form of Writ of Trial.

William the Fourth, by &c., to the sheriff of our county of [or, to the judge of , being a court of record for the recovery of debt, in our county of , as the case may be.]

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REGULE
GENERALES.

Whereas *A. B.*, in our Court before us at Westminster, [*or*, in our Court before our justices at Westminster, *or*, in our Court before the barons of our Exchequer at Westminster, as the case may be,] on the [*date of first writ of summons*] day of _____ last, impleaded *C. D.* in an action on promises [*or as the case may be*]; for that whereas one &c. [*here recite the declaration as in a writ of inquiry,*] and thereupon he brought suit. And whereas the defendant on the _____ day of _____ last, by his attorney, [*or as the case may be,*] came into our said Court and said [*here recite the pleas and pleadings to the joinder of issue,*] and the plaintiff did the like. And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed £20; and it is fitting that the issue above joined should be tried before you the said sheriff of _____ [*or, judge, as the case may be*]: we therefore, pursuant to the statute in such case made and provided, command you that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in nowise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly; and when the same shall have been tried in manner aforesaid, we command you that you make known to us at Westminster [*or*, to our justices at Westminster, *or*, to the barons of our said Exchequer, as the case may be,] what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the _____ day of _____ next. Witness at Westminster, the _____ day of _____ in the _____ year of our reign.

No. 6.

Form of Indorsement thereon of the Verdict.

Afterwards, on the [*day of trial*] day of _____ in the year _____ before me, sheriff of the county of _____ [*or, judge of the court of _____*] came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within-named, [*or, as the case may be,*] and the jurors of the jury by me duly summoned, as within commanded, also came, and being duly sworn to try the said issue within mentioned on their oath, said, that

No. 7.

Form of Indorsement thereon, in case a Nonsuit takes place.

[*After the words "duly sworn to try the issue within mentioned" proceed as follows:*]

And were ready to give their verdict in that behalf; but the said *A. B.* being solemnly called, came not, nor did he further prosecute his said suit against the said *C. D.*

No. 8.

Form of Judgment for the Plaintiff, after Trial by the Sheriff.

[*Copy the Issue and then proceed as follows:*]

Afterwards, on the [*day of signing Judgment*] day of _____ in the year _____ came the parties aforesaid, by their respective attorneys aforesaid, [*or as the case may be,*] and the said sheriff, [*or, judge, as the case may be,*] before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words; to wit,

[*Copy the Indorsement.*]

Therefore it is considered, &c. [*in the same form as before.*]

(Signed by the fifteen Judges.)

1834.

RÈGLES
GÉNÉRALES.*Hilary Term, 4th William 4.—1834.*

IT IS ORDERED, That from and after the first day of Easter Term next inclusive, the following Rules shall be in force in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas and Courts of Error, in the Exchequer Chamber.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties. All pleadings to be delivered.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated: and if any demurrer shall be delivered, without such statement, or with a frivolous statement, it may be set aside as irregular, by the Court or a Judge, and leave may be given to sign judgment as for want of a plea. Cause of demurrer to appear on margin.

Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way. Notice of additional cause.

3. No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same, otherwise judgment. No rule for joinder in demurrer.

4. To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof. No signature to joinder in demurrer.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not as heretofore by any officer of the Court. Making up issue and demurrer books.

6. No motion or rule for a concilium shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument at the request of either party, with the Clerk of the Rules in the King's Bench and Exchequer, and a Secondary in the Common Pleas, upon payment of a fee of one shilling, and notice thereof shall be given forthwith by such party to the opposite party. No conciliums.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior Judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two Judges of the Court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk Copies of demurrer books, &c. to be delivered.

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**RULES
GENERALS.**

Judgment
recovered.

of the Rules of the King's Bench and Exchequer, or the Secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

8. Where a defendant shall plead a plea of judgment recovered in another Court, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a Court of Record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a Judge.

Writ of error
no supersedeas
until error
stated.

If error frivolous,
execution.

9. No writ of error shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued.

Provided, that if the error stated in such notice shall appear to be frivolous, the Court, or a Judge, upon summons, may order execution to issue.

Transcribing
record.

10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the Clerk of the Errors of the Court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros. The Clerk of the Errors shall, after payment of the transcript money, deliver the writ of error when returnable, with the transcript annexed, to the Clerk of the Errors of the Court of Error.

Assignment
of errors.

11. No rule to allege diminution, nor rule to assign errors, nor scire facias quare executionem non, shall be necessary, in order to compel an assignment of errors; but within eight days after the writ of error, with the transcript annexed, shall have been delivered to the Clerk of the Errors of the Court of Error, or to the signer of the writs in the King's Bench in cases of error to that Court, or within twenty days after the allowance of the writ of error in cases of error coram nobis, or coram vobis, the plaintiff in error shall assign errors, and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros.

Pleadings in
error, to be
delivered.

12. The assignment of errors and subsequent pleadings thereon shall be delivered to the attorney of the opposite party, and not filed with any officer of the Court.

Joinder in error,
&c.

13. No scire facias ad audiendum errores shall be necessary (unless in case of a change of parties), but the plaintiff in error may demand a joinder in error, or plead to the assignment of errors; and the defendant in error, his executors or admini-

strators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed.

Provided, that if in any case the time allowed as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the tenth day of August in any year, the party entitled to such time shall have the like time for the same purpose, after the twenty-fourth day of October, without reckoning any of the days before the tenth of August.

Provided also, that in all cases such time may be extended by a Judge's order.

Provided also, that in all cases of writs of error to reverse fines and common recoveries, a scire facias to the terretenants shall issue as heretofore.

14. When issue in law is joined, either party may set down the case for argument with the Clerk of the Errors of the Court of Errors, or the Clerk of the Rules in the King's Bench, as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer, without any rule or motion for a concilium.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench, on writs of error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk of the Errors, or the Clerk of the Rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies.

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument, but after judgment shall have been given in the Court of Errors in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the Court below, on a certificate of a Clerk of the Errors of the Exchequer Chamber of the judgment given, for which a fee of 3s. 4d. and no more, shall be charged.

17. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity Term, 1st Will. IV. s. 12.

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GENERAL.

Suspension from
10 Aug. to 24
Oct.

Extension of
time.

Scire facias to
terretenants.

Setting down
errors for argu-
ment.

Delivery of
error books to
judges.

Entry on record
of proceedings,
in error.

Notice of taxa-
tion of costs.

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REGULÆ
GENERALES.

Nisi prius
record.

Writs of trial.

Admission of
facts stated in
written docu-
ment.

Time for
inquiry.

Costs of
proving written
document.

Costs of appli-
cation.

18. It shall not be necessary to repass any Nisi Prius record which shall have been once passed, and upon which the fees of passing shall have been paid; and if it shall be necessary to amend the day of the teste and return of the distringas or habeas corpora, or of the clause of Nisi Prius, the same may be done by the order of a Judge obtained on an application ex parte.

19. Writs of trial shall be sealed only, and not signed.

20. Either party, after plea pleaded and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A, or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement upon such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a Judge, why he should not consent to such admission; or in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and in the absence of a special order, the same shall be costs in the cause.

(Signed by the fifteen Judges.)

FORM OF NOTICE REFERRED TO.

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In the K. B. }
C. P. } A. B. v. C. D.
or Exchequer }

Take notice, that the { Plaintiff } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { Defendant } his attorney, or agent, at on , between the hours of ; and that the { Defendant } will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed, or executed, as they purport respectively to have been ; that such as are specified as copies, are true copies ; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively ; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

To E. F. Attorney G. H. Attorney
or agent for { Defendant } for { Plaintiff }
{ Plaintiff } { Defendant }

[Here describe the documents, the manner of doing which may be as follows :]—

ORIGINAL.

Description of the Documents.	Date.
Deed of Covenant between A. B. and C. D., 1st part ; and E. F. 2d part	1st January, 1828
Indenture of Lease from A. B. to C. D.	1st February, 1828
Indenture of Release between A. B. and C. D. 1st part, &c.	2d February, 1828
Letter, Defendant to Plaintiff	1st March, 1828
Policy of Insurance on Goods by ship Isabella, on Voyage from Oporto to London.....	3d December, 1827
Memorandum of Agreement between C. D., Capt. of said Ship, and E. F.	1st January, 1828
Bill of exchange for 100 <i>l.</i> at Three Months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	1st May, 1829

COPIES.

Description of Documents.	Date.	Original, or Duplicate, served, sent, or delivered, when, how, and by whom.
Register of Baptism of A. B. in the Parish of X... }	1st January, 1808	
Letter—Plaintiff to Defendant	1st February, 1828	{ Sent by General Post, 2d February, 1828.
Notice to produce Papers	1st March, 1828	{ Served 2d March, 1828, on Defendant's Attorney, by E. F. of
Record of a Judgment of the Court of King's Bench in an Action J. S. v. J. N. }	Trinity Term, 10th Geo. IV.	
Letters Patent of King Charles II., in the Rolls Chapel	1st January, 1680.	

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Hilary Vacation, 1834.

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DIRECTIONS to taxing Officers as to all Writs issued on or after the 15th March, 1834.

Costs in actions
not exceeding
20*l*.

In all actions of assumpsit, debt, or covenant, where the sum recovered or paid into Court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds without costs, the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed. Provided, that in case of trial before a judge of one of the superior courts, or judge of assize, if the judge shall certify on the postea that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale.

At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of twenty pounds or not, in the following form:—

“ Debt above 20*l*.”

“ Debt 20*l*. or under.”

Incipitor. The officers of the Exchequer to allow no incipiturs of judgment on paper, and to mark the judgment on the postea.

Drawing judgment. 3*s*. 4*d*. to be allowed for drawing the judgment in all cases.

Contents of brief sheet. Every brief sheet to contain eight folios at the least, which are to be paid for at the rate of 6*s*. 8*d*. per sheet for drawing, and 3*s*. 4*d*. copying.

Allowance to witnesses. For every witness the allowance for travelling to be the expense actually paid, not exceeding 1*s*. a mile, unless under special circumstances.

Counsel's fees on writ of trial. No fee to counsel to be allowed on writs of trial, except in trials before the judge of the Sheriff's Court of London, or of other courts of record where attorneys are not allowed to practice, and then one guinea only.

Counsel's clerks' fees. The fees to be allowed to Counsel's Clerks not to exceed as under:—

	£	s.	d.
Upon a fee under 10 guineas.....	0	2	6
Ten guineas and under 20 guineas.....	0	5	0
Twenty guineas and upwards.....	0	10	0
Senior counsel's clerks on consultation.....	0	7	6
The other counsel's clerks, each.....	0	2	6
Attending as a witness at trials to prove documents..	0	10	6

SCHEDULE 1.

Commencement of Suit.

Letter before action (if sent).....	0	2	0
Instructions to sue.....	0	3	4
Writ.....	0	10	0

	£	s.	d.
Copy and service.....	0	5	0
Bill and copy to indorse.....	0	2	0
Searching for appearance.....	0	3	4
Instructions for declaration.....	0	3	4
Drawing same at 1s. per folio (folio 6).....	0	6	0
Ingrossing.....	0	2	0
Notice thereof (when filed).....	0	5	0
Drawing particulars and copy.....	0	2	6
Rule to plead.....	0	1	0
Demanding plea.....	0	3	0
Drawing issue, of whatever length.....	0	3	4
Ingrossing issue to deliver at 4d. per folio (10 fo.)..	0	3	4
Notice of trial.....	0	2	0

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SCHEDULE 2.

When the Cause is tried before the Sheriff.

Summons for trial.....	0	1	0
Copy and service.....	0	3	0
Attending for order.....	0	3	4
Paid order.....	0	1	0
Copy and service.....	0	3	0
Ingrossing the writ of trial (folio 14).....	0	4	8
Parchment.....	0	3	0
Paid sealing.....	0	0	7
Attending thereon.....	0	3	4
Copy particulars, to annex.....	0	2	0
Subpoena.....	0	5	0
Copy and Service.....	0	3	0
Making minutes of evidence for the hearing.....	0	13	4
Attending to enter the cause.....	0	3	4
Paid part of the sheriff's fee on leaving the same....	0	4	0

(No more to be paid if the record be withdrawn before trial.)

Attending Court on trial.....	0	13	4
Paid rest of fees of trial.....	1	4	6
Notice of taxing.....	0	3	0
Affidavit of increase.....	0	5	0
Paid filing affidavit (whether town or country).....	0	1	0
Bill of costs and copies.....	0	4	0
Attending taxing.....	0	3	4
Paid taxing (in K. B. and Exchequer).....	0	2	6
Drawing judgment.....	0	3	4
Entering on roll at 4d. per folio.....	"	"	"
Paid Roll.....	0	0	10
Paid entries (as before).....	"	"	"
Paid judgment fee and docket (as before).....	"	"	"
Attending thereon.....	0	3	4
Term fee.....	0	10	0

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		£	s.	d.
<i>Letters in Country Cause.</i>				
Under 50 miles		0	2	0
Above 50 miles		0	4	0
Above 100 miles		0	6	0
<i>Where Fi. Fa. and Warrant thereon; viz.</i>				
In town		0	8	0
In country		0	13	0

SCHEDULE 3.

When the Cause is tried at Nisi Prius, and Verdict for 20L., or under.

Ingrossing record (folio 14)	0	4	8
Parchment	0	3	0
Paid sealing.	0	0	7
Attending thereon	0	3	4
Copy particulars to annex	0	2	0
Venire	0	6	6
Paid return	0	2	0
Attending thereon	0	3	4
Distringas	0	7	6
Paid return (about)	0	15	0
Attending thereon	0	3	4
Subpœna	0	5	0
Copy and service	0	3	0
Instructions for brief	0	13	4
Brief and copy (and no more)	2	0	0
Attending to enter cause	0	3	4
Paid entering (about)	0	18	0
Counsel (as usual)	"	"	"
A tending Court on trial	1	1	0
Paid fees on trial (about)	3	15	0
Postea	0	5	0
Notice of taxing	0	3	0
Affidavit of increase	0	5	0
Paid filing the same	0	1	0
Bill of costs and copy	0	4	0
Attending taxing	0	3	4
Paid taxing, (in K. B. and Exchequer) as usual, say ..	0	4	0
Drawing judgment	0	3	4
Entering on roll at 4d. about 19 fo.	"	"	"
Paid roll	0	0	10
Paid judgment fee and docket	"	"	"
Attending thereon	0	3	4
Term fee	0	10	3

Letters in Country (according to distance.)

Costs not to be taxed until judgment signed, unless the parties compromise without judgment.

Where Fi. Fa. and warrant (as before.)

(Signed by the fifteen Judges.)

Trinity Vacation, 17th June, 1833.

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IT IS ORDERED, that from and after the tenth day of July next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that upon such render being duly made and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

Render by bail.

(Signed by the fifteen Judges.)

THE KING v. ST. NICHOLAS, ROCHESTER.

UPON appeal against an order for the removal of *Cooper Press*, his wife and children, from the parish of Saint Margaret, in the city of Rochester, to the parish of Saint Nicholas, in the same city, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

No settlement can be gained since 1 *Will.* 4, c. 18, by renting a tenement in which rooms are underlet by the year.

On the 3d October, 1831, *Press* took for a year a house in the appellant parish, at the rent of 40*l.* per annum. He entered into possession of the house, and remained there with his family until the 3d day of October in the following year, and paid the rent for half the year, and fulfilled all the conditions of 6 *Geo.* 4, c. 57, and 1 *Will.* 4, c. 18, unless the Court shall be of opinion that, under the following circumstances, the house was not *occupied* by the pauper within the meaning of the latter statute.

So, if they are underlet for a shorter period, *semble*.

The house in question was a separate and distinct dwelling-house, consisting of three floors. When *Press* had been in possession about three months, viz. on the 4th January, 1832, he underlet the two upper floors unfurnished to one *Boucher*, and during all the time *Boucher* stayed in the house, *Press* occupied the ground-floor only by himself and family. *Boucher's* agreement was, that he should take

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these two floors by the quarter, at the yearly rent of 22*l.*; that *Boucher* should have the use of a wash-house on the ground-floor, in common with *Press*, and that the latter should have a sleeping-room in the upper floor for one of his children, whenever *Boucher* did not want it for his own family. *Boucher* entered into possession of the two floors on the same day, furnished the rooms himself, stayed in them upwards of two quarters, and paid the stipulated rent. During *Boucher's* residence there he had the joint use of the wash-house with *Press*, one of whose children, by the permission of *Boucher*, occupied the sleeping-room in the upper floor for about a fortnight or three weeks. The ground-floor was not separated from the upper floors by any door or partition, and both *Press* and *Boucher* had common access to it by the front and back doors, and each took the key of the front door, whenever he had need of it, without asking permission of the other.

Walsh and *Espinasse*, in support of the order of sessions. The question for the opinion of the Court is, whether there was an occupation of the house by the pauper within the meaning of 1 *Will.* 4, c. 18. Under the 59 *Geo.* 3, c. 50, which required that the house should be *held* by the person hiring the same, it was sufficient if the party rented a dwelling-house, and resided in it, although he underlet part; *Rex v. North Collingham*(a), *Rex v. Great Bolton*(b). The 6 *Geo.* 4, c. 57, required that the house should be *occupied* under a yearly hiring. It was held to be a sufficient occupation under this statute, where the party rented and *dwelt* in part of the house, although he underlet the remainder; *Rex v. Ditchet*(c), *Rex v. Great Bentley*(d). In *Rex v. Ditchet*, *Littledale, J.* says, "The word *occupation*, as applied to a house, undoubtedly implies personal residence.

(a) 2 Dowl. & Ryl. 743; 1 Barn. & Cressw. 578.

(b) 2 Mann. & Ryl. 227; 8 Barn. & Cressw. 71.

(c) 4 Mann. & Ryl. 151; 9 Barn. & Cressw. 176.

(d) 10 B. & C. 520.

But if a lessee of a house dwell in any part of it, though he let the other part, he, in point of law, is to be considered as the *occupier* of the whole." The statute 1 W. 4, c. 18, requires also that the house shall be occupied. In *Fludier v. Lombe* (a), in construing the statute 11 G. 1, c. 18, in which the word "householder" occurs, it was decided that a party did not cease to be the *occupier* of a house by letting lodgings, provided he were personally resident therein. An individual who rents and resides in a house is ratable to the relief of the poor as an occupier, although he reserve only a small part of the house to himself, and lets the remainder to a lodger; *Nolan's Poor Laws* (b). The mayor of *Maidstone* lets part of his house to the Judges during the assizes. If it be held that *Press* did not gain a settlement, neither will the mayor of *Maidstone*. *Rex v. Tonbridge* (c) is distinguishable. In that case there was no occupation of premises of sufficient value for a whole year.

Cresswell and *Hills* contra. The opinion of *Littledale, J.*, in *Rex v. Ditchet*, was given with reference to 6 Geo. 4, c. 57. That statute merely required an *occupation in point of law*; this statute requires an *occupation in point of fact*; since, as appears both from the preamble and the enacting part of the statute, it was passed to prevent the inconveniences resulting from the decision that an occupation in point of law was sufficient. The 59 Geo. 3, c. 50, requires that the house shall be held, and the land occupied. In *Rex v. Collingham*, Lord *Tenterden* relied on this difference of expression. In 1 W. 4, c. 18, the word *held* is omitted, and the house is to be *actually occupied* by the party hiring it. As the legislature has made use of these expressions, it must have been for the purpose of preventing a party who takes lodgers from gaining a settlement. *Rex v. Tonbridge* is a strong authority upon this point. The decision in that


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(a) Cases temp. Hardw. 307.

(b) 1 Nol. P. L. 176, 3d ed.

(c) 9 Dowl. & Ryl. 128; 6 Barn.

& Cressw. 88.

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case turned entirely upon the construction of the word "occupation," in the former statute, as applied to land. The pauper held the land, but *Maynard* was in the joint occupation of it with him. [*Patteson*, J. Use and occupation would have been maintainable against both. The joint *occupation* would have been sufficient, if the *value* had been sufficient. In this case the pauper retained a portion of the value of 18*l*. The question is, whether 1 *W.* 4, c. 18, requires that the distinct dwelling-house of which the tenement is to consist, should be *distinctly occupied* by the party.] The 1 *W.* 4, c. 18, recites 6 *Geo.* 4, c. 87, and that doubts had arisen respecting the intentions of the legislature as to the occupation of the house; and then enacts, that no person shall gain a settlement under such yearly hiring of a dwelling-house, unless such house shall be *actually* occupied under *such* yearly hiring, by the person hiring the same. Can a person be said to be the *actual* occupier of a house when he has given to another person a right to exclude him from two-thirds of the house? The word "*such*" is material, because it refers to 6 *Geo.* 4, c. 57, which is recited, and clearly means the yearly hiring of a separate and distinct dwelling-house. [*Denman*, C. J. The case of the mayor of *Maidstone* is quite in point.] The statute of *W.* 4 contains a positive enactment, and from the construction contended for, no mischief would arise. The statute was meant to put an end to doubts, which occasioned an expense in litigation more than sufficient to have maintained the pauper for his life. [*Patteson*, J. On the other hand it may be an inducement to overseers to look out for evidence that a pauper, who occupied a dwelling-house, has let out a bed for one night.] That would not be an underletting. In *Rex v. Macclesfield* (a), *Parke*, J. expressed an opinion that since the statute of 1 *W.* 4, an occupation by an under-tenant would not be sufficient. [*Littledale*, J. May not this distinction be made, that if the underletting be for less

(a) 2 Barn. & Adol. 870.

than a year, the person who resides in, and underlets part of it from time to time, is still the occupier? The argument now made use of would exclude ordinary lodging-house-keepers from gaining a settlement.] It certainly would; but no hardship would follow, for the only question in these cases is, *where* the party was last legally settled, and not whether the party is entitled to be relieved. If underletting a part for twelve months will prevent a settlement being gained, underletting for one month will have the same effect. The great desideratum in matters relative to settlements is *certainty* (a). Words may have different meanings, as applied to different subject-matters in different statutes. The meaning of the word "inhabitants," in its popular sense, is, persons who *dwell* in any place. But in the construction of 22 *Hen.* 8, c. 5, it has been held to include all the *occupiers* of land in a county, although actually living elsewhere, and to exclude servants and lodgers who *dwell* in the county; *Rex v. Hall* (b).

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DENMAN, C. J.—The word "occupier" may have various meanings, according to the occasion or subject-matter. One meaning may be attached to the word with reference to the occupier of a burgage tenement, for the purpose of voting (c); another with respect to the occupier of a dwelling-house, for the purpose of being rated (d). A new distinction is drawn by this statute—an occupation in law only was formerly necessary, under 6 *Geo.* 4, c. 57. Now an occupation in fact is required. The statute of 1 *W.* 4 recites the 6 *Geo.* 4, c. 57, and states that doubts had arisen as to what was an occupation under that statute. The words are these: "And whereas doubts have arisen with respect to the intentions of the legislature concerning the occupation of such house, building, or land, by the person hiring the same, and concerning the amount of the rent to be paid, and the person paying the same; and


(a) *Vide ante*, vol. i. 18.

(c) Heywood on Boroughs, 306.

(b) 2 *Dowl. & Ry.* 241; *S. C.* 1

(d) *Ante*, vol. i. 194.

Barn. & Cressw. 123.

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whereas it is expedient that such doubts should be removed;" and then the statute prohibits the gaining a settlement, "by reason of such yearly hiring of a dwelling-house, as in the said act (6 Geo. 4) expressed, unless such house shall be *actually occupied* under such yearly hiring in the same parish by the person hiring the same." A *constructive* occupation therefore will not do; there must be an *actual* occupation. What then does this case state? That *Boucher* occupied the two upper floors, and *Press* the ground-floor. Can we say in the face of this statute, that when *Press* only occupied the ground-floor, he was the *actual* occupier of the whole house? The consequences resulting from this statute are remarkable; for no person, however respectable, who underlets a portion of his house, can acquire a settlement by renting a house however large. It may be very doubtful whether the legislature ever contemplated such cases, but the words they have used prevent a settlement being gained under such circumstances.

LITLEDALE, J.—In *Rex v. Ditchet*, it appeared to me, that the word "occupation" meant, as I then stated it, a constructive occupation, and to that opinion I still adhere. Now, however, I find a new act, which has introduced quite a new term. The term is "*actually occupied*," whereas before it was only "occupied." That must mean, not a constructive occupation, but an occupation in point of fact. In this case the pauper could not go into certain rooms of the house; he had parted with the occupation of them. I put a question to Mr. *Cresswell*, whether a distinction could be raised upon the circumstances of *Press*'s having parted with his interest for a less term than a year? To this it was properly answered, that if underletting for the whole twelve months would prevent the party from being an occupier; the underletting for a less period than a whole year would prevent him. All persons, therefore, who let lodgings, will be prevented from gaining settlements, but that cannot be helped. It is very desirable to have strict provisions, which

can be applied without difficulty. We had better adhere to the words of the statute.


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TAUNTON, J.—I think most clearly, for the reasons given in the argument, that it behoves us on all occasions to attend to the words of the statute, and not to act upon any conjectures of our own. Great inconvenience has arisen from judges acting upon such conjectures. Upon the language of this statute, which was made for the purpose of removing doubts, I have no hesitation in coming to a conclusion. The statute recites part of the provisions of 6 Geo. 4, and that doubts had arisen with respect to the intentions of the legislature concerning the occupation of such house; and in order to obviate these doubts, enacts that no person shall acquire a settlement by or by reason of such yearly hiring of a dwelling-house, as in the said act expressed, unless such house shall be *actually occupied* under *such* yearly hiring in the same parish, by the person hiring the same, for the term of one whole year. This word “such” is of very material force in this case, as shewing that something is added by 1 W. 4, c. 18, to the provisions of 6 Geo. 4. At this day, it is necessary that the house be separate and distinct, under 6 Geo. 4, c. 57; and under 1 W. 4, c. 18, that it not only be separate and distinct, but also *actually occupied* under the yearly hiring, and not only so, but by the party hiring the same. Now are all these conditions performed in the present instance? *Press* divided the possession between himself and *Boucher*, reserving a yearly rent of 22*l*. Unless we resolve in the very teeth of this act, how can we say that *Press* actually occupied the house under the yearly hiring, when it appears that *Boucher* occupied a part of it? I think the house was not actually occupied by the pauper.

PATTESON, J.—I am entirely of the same opinion, on the plain words of the last statute. The words “actually occupied” must be read as if they were incorporated in 6 Geo.

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4, c. 57, which is not repealed, and re-enacted by 1 *Will.* 4, c. 18. Reading the 6 *Geo.* 4, as if these words were incorporated in it, a party, to gain a settlement by renting a tenement, must have *actually* occupied a separate and distinct dwelling-house; by which I understand the *whole* dwelling-house, separate and distinct from *any other person*. This will not affect the decisions on the liability of persons to be rated, or their rights of voting as occupiers(a).

Order of Sessions quashed.

(a) Under 2 *Will.* 4, cap. 45, sects. 27, 29, 30.



The KING v. The Inhabitants of IVER.

A settlement is gained under 6 *Geo.* 4, c. 57, by renting two distinct dwelling houses, although only one be actually occupied by the party himself.

ON appeal against an order of two justices, whereby *Edward Ewer* was removed from the parish of Iver, Bucks, to the parish of Rickmansworth, Herts, the Court of Quarter Sessions quashed the order, subject to the opinion of the Court of King's Bench on the following case :

Henry Ewer (father of the pauper, who has never gained a settlement in his own right) in 1823 took a house in Iver, of Mr. *Franklin*, for which he paid 6*l.* per annum, and also 1*l.* per annum for a piece of land. In the adjoining house, also belonging to Mr. *Franklin*, lived *Dean*, another tenant. No other building adjoined either of the two houses ; there was no internal communication between the houses, and there was a separate outer door to each ; each house had a chimney running up back to back in the partition wall between the houses, and there was one continuous roof over both. A few days previous to January 1830, *Dean* quitted, and *Henry Ewer* applied to Mr. *Franklin* to take *Dean's* house instead of his own. Mr. *Franklin* agreed, if *Henry Ewer* could find a tenant for the other. *Henry Ewer* brought his son *William Ewer*

to Mr. *Franklin*, who refused to take him as tenant. *H. Ewer* then agreed with Mr. *Franklin* to become tenant for the whole, and to pay 6*l.* for each house, and 1*l.* for the land, that is, 13*l.* per year; and thereupon *Henry Ewer* went into the occupation of *Dean's* house and gave up the possession of the other to his son *William Ewer*, who with his family continued in the occupation thereof till Michaelmas 1831, when he quitted, and whereupon *Henry Ewer* gave up that house to Mr. *Franklin*, who put in another tenant; *Henry Ewer* paid the rent of 13*l.* to Michaelmas 1831, and Mr. *Franklin* gave him at each Michaelmas a separate receipt for the rent of each house. From 1823, to Michaelmas 1831, no alteration was made in the houses, while the houses were occupied by *Dean* and *Henry Ewer*, and subsequently while they were occupied by *Henry Ewer* and his son, the occupier of each house was separately assessed to the poor rate: *Henry Ewer* did not pay his son's poor rate, nor did he use any part of his son's house.

The question for the opinion of the Court is, whether *Henry Ewer* gained a settlement in Iver, by renting a separate and distinct dwelling-house or building.

Talfourd, Serjt. and *Munro*, in support of the order of sessions. *Rex v. Tadcaster* (a), and *Rex v. Macclesfield* (b), are precisely in point.

They were here stopped by the Court.

Biggs Andrews, *contra*. By the second section of 6 Geo. 4. cap 57, the act upon which the question must in this case depend, it is enacted, that no person shall acquire a settlement by reason of settling upon, renting or paying parochial rate for any tenement, not being his or her own property, unless such tenement shall consist of a *separate or distinct dwelling-house* or building, or of land, or of both,

(a) *Ante*, vol. i. 466; 4 Barn. & Adol. 703. (b) 2 Barn. & Adol. 873.

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bonâ fide rented by such person for 10*l.* a year. In this case the pauper only actually occupied one of the dwelling-houses. [*Patteson*, J. Do you propose to contend, that if a man rents one house and lives in it, and holds another in the same parish from a different landlord, that he cannot gain a settlement unless the one in which he lives is above the value of 10*l.* a year?] That is the proposition intended to be submitted to the consideration of the Court. The words of the statute require that the party should be in the occupation of a separate and distinct dwelling-house. In *Rex v. Ditchet (a)*, *Littledale*, J. was of opinion that there was an occupation of a dwelling-house within the meaning of 6 *Geo.* 4, c. 57, although a portion of the dwelling-house was underlet by the supposed occupier; but he says "it might have been otherwise, if he had underlet the whole house, and occupied no part of it (*b*)."
 The 6 *Geo.* 4, c. 57, enacts, that no settlement shall be gained by renting a tenement, "unless it shall consist of a separate and distinct dwelling-house or building, or of land, or of both." It is obvious, that by the word "building," the legislature did not mean to designate a dwelling-house. In this case there are two distinct dwelling-houses. [*Denman*, C. J. The argument would go this length, that if a man rented forty houses, each of the value of 9*l.* and lived in one, he would gain no settlement.] That must be admitted. The statute of 1 *Will.* 4, which recites that doubts had arisen, and is declaratory, shews that the legislature did not intend that a party should gain a settlement, unless the dwelling-house were occupied by the party himself. [*Denman*, C. J. That act is not declaratory. *Taunton*, J. No act is declaratory unless it contain the words "It is hereby declared."] *Rex v. Tadcaster*, and *Rex v. Macclesfield*, are both distinguishable. In the former case the question arose upon the occupation by the pauper of a house and building, for which he paid 10*l.* Here, the ques-

(a) 4 Mann. & Ryl. 151; 9 Barn.
 & Cressw. 176.

(b) 9 Barn. & Cressw. 185.

tion is upon the words, "a separate and distinct dwelling-house." In *Rex v. Macclesfield*, no allusion was made to the different words used by the legislature, and the pauper occupied the whole of the premises by putting in his journeyman.

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DENMAN, C. J.—It is obvious that the legislature had something in view in the use of a different term; which it is doubtful whether they have carried into effect. We think therefore we had better take a little time to consider this question.

Cur. adv. vult.

DENMAN, C. J., afterwards, in the same term, said—In the case of *The King v. Iver*, we wished to have an opportunity of looking more narrowly into the statutes, and upon looking at the act of parliament which was in force at the time when the pauper's father rented the two houses in the parish of Iver, we are of opinion that he did gain a settlement in that parish.

Order of Sessions confirmed.

THE KING v. THE INHABITANTS OF PRESTON.

ON appeal against an order of justices, by which *John Chaplin* was removed from Monkesleigh, to Preston, in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

27th April, 1825. *Chaplin* was bound an apprentice for six years to *Robert Cousins*, of Monkesleigh. There was no premium, and the indenture, until 1832, had no stamp, Where a deed is produced, bearing the proper stamp, the Court will receive it in evidence, without entering into the inquiry whether it was affixed upon the payment of a sufficient penalty, and within proper time, although it is proved not to have been stamped when executed.

But with reference to the effect of the deed, the Court will inquire into the time it was stamped, in cases where stamping within a limited period is required by statute.

A memorandum indorsed upon an instrument, purporting to be an acknowledgment by the commissioners of stamps, of the payment of a penalty, is not evidence.

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Chaplin served under the indenture, residing all the time in Monkesleigh.

6th July, 1832. 1*l.* for the stamp, and 5*l.* for the penalty were paid to the commissioners of stamps, who caused the indenture to be stamped, and a receipt to be duly written thereon for the 1*l.* and 5*l.* These sums (as appeared by the cross-examination of the overseers of Preston), were provided and paid by the parish of Preston. This evidence was received subject to an objection by the appellant's counsel to its admissibility.

28th August, 1832. *Chaplin* served his former master, *Cousins*, with a written notice dated the 11th August, 1832, requiring him to procure the indenture to be stamped with the double duty.

25th August, 1832. *Cousins* refused to pay the double duty.

5th September, 1832. *Chaplin* signed a written request to the commissioners of stamps to affix the double duty, and paid them the further sum of 1*l.*; a second stamp of 1*l.* was accordingly affixed to the indenture. On the same day *Chaplin* repaid the parish officers of Preston the 1*l.* which they had previously paid for the stamp, but the 5*l.* has not been repaid.

Austin and *Gurdon*, in support of the order of sessions, cited the case of *Rex v. Church Hulme* (a), and urged, that by the clauses of the stamp acts, to which they called the attention of the Court, the penalty upon which alone the commissioners of stamps were authorized in affixing the stamp on this indenture was ten pounds and not five pounds, which was the penalty paid in this case, (under a mis-

(a) This case was cited from vol. 9 of the Law Journal, page 83, of the Magistrates' Cases. The Court refused to admit the report as an authority, on the ground that the work was at that time an anonymous publication, and that therefore the Court had no voucher for the correctness of the report: afterwards, it being stated that Mr. *Colman* (who had argued in the case) had looked over the report and declared it to be correct, the Court received it.

conception on the part of the commissioners), and in all other similar cases, since the passing of 44 Geo. 3, c. 98.

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Biggs Andrews, contra. This line of argument was not anticipated. The only question expected to be discussed was, whether, under the authority of *Rex v. Church Hulme*, the statute of 8 Anne, c. 9, had been sufficiently complied with. [*Patteson, J.* Is the point in *Rex v. Church Hulme* the same as that in *Rex v. Chipping Norton*?(a).] The question in *Rex v. Chipping Norton* turned upon an indenture made before the passing of 44 Geo. 3, c. 98. [*Patteson, J.* In *Rex v. Church Hulme* it was held the indenture could not be stamped at all after six months.] That was under the 8 Anne, c. 9, s. 32, which imposes a duty according to the amount of the premium. Here, no premium was paid, and therefore no ad valorem duty could be payable. [*Patteson, J.* Is there any case in which the Court have entered into the question, whether the right penalty has been paid or not? There are cases in which they have inquired *when* the penalty was paid.] There is no such case. [*Littledale, J.* I have always understood that if we find a proper stamp upon the instrument, no further inquiry is made.] The deed is good from the beginning, but made not *available* until the proper stamp is affixed. The Court only inquires into the *time when* the stamp was affixed, in cases upon statutes which require that the stamp shall be affixed within a limited time. Were it necessary to do so, it would not be difficult to satisfy the Court that 5*l.* is the proper penalty. [*Patteson, J.* Suppose *no* penalty had been paid at all; if the stamp was upon the deed, I do not think we should inquire *when* it was affixed. If so, that makes an end of the case. *Denman, C. J.* It must be so. We see here a deed properly stamped. It is true, there is upon it a memorandum of the payment of a penalty, but that is nothing to us: the indorsement is not evidence.]

(a) 5 Barn. & Ald. 412.

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Austin referred to *The Apothecaries' Company v. Fernyhough*, (a). [*Denman*, C. J. That case is no authority at all. It merely shews that secondary evidence was received in order to avoid a question as to the necessity of proving the payment of the penalty.]

Byles, on the same side, with *Andrews*, was stopped by the Court.

DENMAN, C. J.—It is not necessary to decide the question which was intended to be raised. If a stamp is not allowed to be put upon the particular instrument after a certain time, then the question, whether the stamp was affixed within the time given by the statute, may be entertained. But when the question is only whether the instrument is *receivable in evidence*, it is sufficient to us if it bears a proper stamp; if it does, the Court will not enter into any further inquiry. The memorandum is no evidence of the fact stated in it.

LITTLEDALE, J. concurred.

TAUNTON, J.—I am entirely of the same opinion, and am glad that the law of the case, as established by long practice, coincides with the justice of the case.

PATTESON, J.—I entirely agree. There has been a very ingenious argument thrown away in this case.

Order of Sessions quashed.

(a) 2 Carr. & Payne, 438.



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CROWDER applied for a rule to shew cause why a writ of habeas corpus should not issue to bring up the body of *Richard Allen*, confined in Fisherton gaol, in Wiltshire.

Allen had been taken before three magistrates, charged with a felony, and after evidence of the felony had been gone into was admitted to bail, upon his giving his own recognizance and that of two other persons, each in 200*l.*, for his appearance at the next assizes. He was afterwards apprehended again and brought before two of the same magistrates, when further evidence was gone into, and he was committed to Fisherton gaol.

Crowder, in support of the application. The magistrates having had the case regularly brought before them, and having decided, after hearing the evidence, that the party should be admitted to bail, had no right to issue a warrant for his apprehension on the same charge, and then to commit him to gaol. Under 7 *Geo.* 4, c. 64, s. 1, the magistrates were authorized either to dismiss the charge or to hold the party to bail, or to commit him to prison. Their decision was to admit him to bail, and they accordingly took bail for his appearance. This then was an adjudication by the three magistrates before whom the case was first heard. [*Denman*, C. J. There was no adjudication at all when bail was taken. What is there in that act to deprive them, or any other magistrates, of the power to commit upon hearing fuller evidence of the felony?] They decided upon the middle course of admitting to bail, and the party was put to the trouble and expense of procuring sureties for his appearance. He ought not then to be harassed by a second apprehension; nor is there any necessity that such a power should reside in the magistrates; for it is their duty, and indeed their constant practice, when not satisfied with the evidence adduced before them, to remand the prisoner for

A. is charged with a felony before three magistrates, who, upon hearing evidence, admit him to bail, and afterwards, upon additional evidence, commit him to gaol, *A.* is not entitled to a habeas corpus to be discharged out of custody.

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a further examination. Such a course ought to have been pursued on the present occasion.

DENMAN, C. J.—It appears to me that the magistrates have taken the very course which it was most proper for them to adopt. The whole matter is not fully investigated in the first instance; subsequently fresh evidence is procured, and the party is committed. It is necessary, for the ends of justice, that the magistrates should possess and exercise this power. There must be no rule.

LITLEDALE, J.—Suppose there had been but slight evidence given the first time the party was before the magistrate, then under the act he is to be admitted to bail; but nevertheless if afterwards further evidence is discovered, he may be fully committed by the magistrates. The magistrates do not *remand* except where further evidence of the crime is *expected*. Here it may be that the evidence which was afterwards produced was not at all anticipated.

TAUNTON J. and PATTESON, J. concurred.

Rule refused.

PARKER v. BURGESS.

To ground a motion for a contempt in disobeying a rule of Court, it is not sufficient to shew the party the original rule, without personal service of a copy of such rule.

HEATON moved for an attachment against *T. C. Wright*, the attorney for the plaintiff, for the nonpayment of a sum of money, in obedience to a rule of Court made in this cause, and the Master's allocatur thereon. His motion was grounded upon an affidavit, which stated that the defendant did, on the 26th November last, serve *T. C. Wright* with a copy of the rule of Court, by leaving the same with a servant at the office of the said *T. C. Wright*, and did, on the 29th of the same month, produce to and shew to the said *T. C. Wright* the said rule, with the Master's allocatur

thereon, and at the same time did demand of him the money, which he refused to pay. He contended that the rule requiring a personal service of the copy of the rule of Court had been substantially complied with, by shewing the original at the time when the demand was made, the object of that rule being merely that the Court might be certain that the party sought to be attached knew of the rule which he was called upon to obey; and he observed that it is not laid down in the books of practice, that the *copy* must be personally served.

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The COURT however said, the service of the copy of the rule is not sufficient. The rule of practice is well known to us, and is of every-day occurrence. There must be a personal service of the *copy* of the rule, as well as a personal demand of the money.

Rule refused.

The KING v. The Inhabitants of LUBBENHAM.

ON an appeal against an order of two justices, by which *Elizabeth Wyllly* and her four children were removed from the parish of Lutterworth, in the county of Leicester, to the parish of Lubbenham in the same county, the Court of Quarter Sessions confirmed the order, subject to the following case :

The respondents proved that the pauper, before her marriage with *Alex. Benj. Wyllly*, gained a settlement in the parish of Lubbenham, by hiring and service. On the part of the appellants the following evidence was given. The marriage of *John Brittain* and *Mary Goode* at Ketton, in the county of Rutland, on the 27th April, 1749: the baptism of *Mary* their daughter, at Ketton, on the 26th May, 1751: the baptism of *John* their son, at Ketton, on the 27th May, 1753: the baptism of *Elizabeth* their daughter, at Ketton, on the 19th January, 1755: the baptism of

Proof that *A.* and *B.* were married in the parish of Dale, and that their children, *C.*, *D.*, *E.*, and *F.* were baptised there, is not evidence from which the justices are bound to infer that *E.* was born there.

Whether they would be justified in drawing such inference from the evidence, *quære.*

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Susanna their daughter, at Ketton, on the 25th December, 1756: the marriage of *Alexander Wyllly*, a foreigner, who had no settlement, with the said *Elizabeth Brittain*, on the 18th January, 1779; and the birth from that marriage of *A. B. Wyllly*, who afterwards married the pauper. Upon these facts the appellants submitted that they had sufficiently established a birth-settlement of *Elizabeth Brittain*, the mother of the pauper's husband, in Ketton, and that a settlement in that parish devolved upon him, and was acquired by the pauper, on her marriage with him. The respondents relied on *Rex v. North Petherton*(a), that *Elizabeth Brittain's* birth-settlement was not sufficiently proved, and the Court confirmed the order.

Hildyard and Sir *G. Lewin*, in support of the order of sessions. The certificates of baptism are not evidence of the *place* of the birth of the parties baptised. *Rex v. North Petherton* is an express decision to that effect. The evidence given in this case is merely the same kind of evidence accumulated. [*Patteson, J.* It is something more; there is evidence of the marriage, and that, coupled with the register, in some degree shews the age of the parties baptised.] Suppose the parents resided in an extra parochial place, they would bring their children to the adjoining parish to be baptised. A clergyman is only bound to baptise the children of his parishioners, and if it be held that the place of baptism is to be presumed to be the place of birth, every clergyman will feel it to be his duty to refuse to baptise persons who are not parishioners, lest he should unjustly raise that presumption against the interests of the parish. [*Taunton, J.* I cannot ascertain what question is submitted for our consideration.] The question intended to be submitted was, whether upon the state of facts the justices in sessions were *bound* to presume that the birth-place of *Elizabeth Wyllly* was in Ketton. The Court of Quarter Sessions held that Ketton was not proved to be

(a) 8 Dowl. & Ryl. 325; S. C. 5 Barn. & Cressw. 508

the birth-place of *Elizabeth Wyllly*, and it was a question entirely for their consideration.

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Humfrey and *G. S. White*, contra. In *Rex v. North Petherton, Bayley, J.* says, "I do not say that the register of baptism, when connected with other circumstances, is not *evidence* from which the justices may be warranted in drawing a conclusion as to where the child was born." The baptism of the former children and the marriage of the parents are other circumstances which are connected with the register of the baptism of one child. The case of *Rex v. North Petherton* only decides that a register of baptism is not alone *sufficient* evidence of the place of a person's birth. Neither *Bayley, J.* nor *Holroyd, J.* in that case, doubted the *admissibility* of the register. [*Denman, C. J.* Undoubtedly it is evidence of something, namely, that the child was baptised there at that time, because it is the duty of the clergyman to make the entry.] *Bayley, J.* likewise says in his judgment, "If the child was very young at the time it was baptised, the register would be presumptive evidence that it was born in the parish where it was baptised." There is evidence in this case of the marriage, and the baptism of two children before the baptism of *Elizabeth*. This must be good evidence from necessity; an individual who should recollect anything of the father and mother must be nearly 100 years old.

DENMAN, C. J.—It is not clear for what purpose this case is sent to us. It seems to me, however, that the sessions having found the facts under which they confirmed the order, and having put no particular questions, we must consider that the question intended to be submitted to us was, whether that Court was *bound* to find that the pauper's mother was born in the parish of Ketton. It is enough, without considering whether this succession of entries in the register would be sufficient evidence, were we to *presume* that Ketton was the birth-place of

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Elizabeth Wyly, to say that the sessions were not *bound* in this case to make that presumption.

LITLEDAL, J.—I do not see enough to satisfy me that the sessions have done wrong.

TAUNTON, and PATTESON, JJ., concurred.

Order of Sessions confirmed.

SOUTER v. DRAKE.

The vendor of a leasehold interest is bound to shew the lessor's title to demise, unless it be otherwise stipulated in the contract of sale.

No agreement to dispense with the production of the lessor's title will be implied from the circumstances of the term's being nearly expired, the small value of the property, and the absence of any premium.

ASSUMPSIT. The declaration stated that the plaintiff was possessed of a messuage, by virtue of an indenture of lease, for a residue of a term of years, at the rent of 42*l.*, with certain fixtures therein; and the defendant agreed with the plaintiff to take the house and the lease for the remainder of the term, from Lady-day then next, at 42*l.* per annum, and to pay to the plaintiff 30*l.* for the fixtures, as per list thereof; and in consideration thereof the plaintiff agreed to assign the lease to the defendant, and to deliver up possession of the messuage, together with the fixtures, as per list. Averment, that the plaintiff delivered an abstract of title to the lease, was ready to deliver up possession of the messuage together with the fixtures, and required the defendant to accept the possession and pay the purchase money. Breach, that the defendant would not take the messuage, prepare the assignment, or pay the purchase money. Plea, the general issue. At the trial before *Denman*, C. J., at the Guildhall sittings after Michaelmas term, 1832, it appeared that there was a written agreement signed by the plaintiff and defendant for the assignment of a term of twenty-one years, of which three years and one quarter were unexpired. The plaintiff had produced the lease and the assignment of it to himself, but had refused to produce the lessor's title. A verdict was found for the plaintiff for 25*l.* and the Lord Chief Justice gave the

defendant leave to move to enter a nonsuit. In Hilary term *Thesiger* obtained a rule nisi for a nonsuit, on the ground that it was incumbent on the plaintiff to produce the lessor's title.

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Comyn, in Trinity term, shewed cause. The question turns entirely upon the agreement, and it is submitted that the plaintiff was not bound to deduce the title of his landlord. The cases cited when this rule was moved for, are collected in *Purvis v. Rayer*(a). They are all cases *in equity*, where a bill has been filed for a specific performance of an agreement. It is not unreasonable that one rule should prevail in a Court of Law and another in a Court of Equity, where a bill is filed for the specific performance of an agreement. In *George v. Pritchard*(b), which is a case subsequent to *Purvis v. Rayer*, Lord Tenterden decided, after adverting to the cases decided in the Courts of Equity, that the vendor of a leasehold estate is not bound to produce his lessor's title without an express stipulation to that effect. It would be very inconvenient if a purchaser could call upon the vendor to produce his landlord's title in a case where the lease sold is only for 3½ years, as the title in all probability may be the same as that to a very large estate, and it may be impossible for the vendor to produce it. The terms of the agreement admit the plaintiff's right to the lease.

Thesiger and *G. Hayes*, in support of the rule. There is nothing in the agreement to shew that the defendant intended to relinquish any right to call for the title. In *Spratt v. Jeffery*(c), the vendor agreed to sell two leases and the goodwill of a public house "as he held the same;" and it was decided that these words qualified the contract. But *Parke*, J. expressly says in that case(d), that "there can be no doubt that the vendor of a lease *unconditionally*, undertakes to give

(a) 9 Price, 488.

(b) Ryan & Moody, 417.

(c) 5 Mann. & Ryl. 188.

(d) 10 Barn. & Cress. 261.

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a good title ;" and no qualifying words are introduced in the agreement in question.

In equity it is now a settled rule, that the purchaser of a leasehold estate may call for the production of the lessor's title. Considerable doubts were formerly entertained on the subject, but in *Purvis v. Rayer* the position was finally established, and all the former authorities are there collected. Since this decision, it has been the invariable course to introduce into particulars of sale of leasehold property, a stipulation that the vendor shall *not* be bound to produce the title to the freehold. *George v. Pritchard* is only a *nisi prius* decision, and the authorities do not appear to have been much considered in that case. From *White v. Foljambe(a)* it would seem that Lord Eldon considered that the same rule ought to prevail in a Court of Law as in a Court of Equity ; for he says that if he were called upon to decide the general question, he should not do so until he had consulted the judges of the Common Law Courts. A similar opinion appears to have been entertained by the Court of Common Pleas in *Temple v. Brown(b)*, where the question arose, but was not decided, in consequence of the difficulty the Court felt owing to the cases in equity. Great inconveniences would follow if a rule were established in one Court different from that which prevails in another. Such a distinction would be at variance with the cases in which it has been settled that a Court of Law will collaterally notice equitable defects in a title, and will not compel a purchaser to take a title which is clearly insufficient in equity ; *Elliott v. Edwards(c)*, *Maberley v. Robins(d)*. The vendor of the smallest freehold interest is bound to produce his title at law ; and the difficulty of drawing any sound distinction between freehold and leasehold property presses with as much force in a Court of Law as in a Court of Equity. In *Fildes v. Hooker(e)*, the true principle which ought to go-

(a) 11 Ves. 337.


(d) 5 Taunt. 625.

(b) 6 Taunt. 60.

(e) 2 Meriv. 421.

(c) 3 Bos. & Pul. 181.

vern the decisions of both Courts, is stated by Sir *W. Grant*, M. R., who says, that "whether the interest be freehold or leasehold, it seems reasonable that he who comes for a specific performance, should be prepared to shew that he is able to give what he seeks to compel a purchaser to take. What is contracted for is not merely a piece of parchment, containing covenants, but an interest in land." Now a leasehold estate is as much an interest in land as a freehold estate, and a long term may be a much more important interest than a freehold for life, both as to duration and value. The mere circumstance of the vendor's being in possession does not shew that he is entitled to a term, or to any specific interest; *Keech v. Hall*(a). The only mode, therefore, by which he can shew that he is really possessed of what he contracts to sell, is by producing his title. It is objected that a party is not bound to do that which is impossible. But the true question is, whether it is an implied term in the agreement, that the title to the freehold should be produced. If it be, and the vendor knew it was impossible for him to fulfil that term of the agreement, he ought not to have so contracted. The argument of inconvenience is, therefore, entitled to no weight, since all the difficulty may be avoided by introducing a few words in the agreement.

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DENMAN, C. J. in this term, delivered the judgment of the Court.

This case, which was tried before me at Guildhall, and in which a rule for entering a nonsuit was obtained, and argued before my brothers *Littledale*, *Parke*, and *Patteson* and myself, turns on the question, whether a lessee in possession, who contracts in general terms to assign his lease, can be called on by the proposed assignee to shew that the lessor had a good title to demise.

However this proposition may have been doubted in former times, the observations of Lord *Eldon* in *White v.*

(a) 1 Dougl. 21.

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Foljambe(a), and in *Deverell v. Lord Bolton*(b), and of Sir William Grant, M. R. in *Fildes v. Hooker*(c), certainly went far to decide it in the affirmative, though the judgment in each case proceeded upon another ground.

But in the case of *Purvis v. Rayer*(d), *Richards*, C. B., after great consideration, evidently after consultation with Lord Eldon, held that the purchaser of the residue of a term for years, from a vendor in possession, *had* a right to call for the lessor's title.

All these were cases in equity, arising on bills for specific performance; and Lord Eldon, and more particularly Sir William Grant, both advert to the possibility of a distinction between them and actions for damages to be recovered at law for breach of contract. We cannot, however, help thinking, that the opinion of these eminent judges, and the decisions, especially that of *Purvis v. Rayer*, are authorities upon the *general* question, whether it arise in a Court of Law or Equity, and that the true ground of refusing relief by a specific performance in these cases is, that the vendor, *by his contract*, was bound to make out a good title in all respects to the subject agreed to be sold, including the right of the lessor to demise, and that he has not done so. If that be his contract, he must equally fail in a Court of Law, unless he can prove a performance of it on his part. And no reason occurs to us, why, as the Courts of Law and of Equity would put the same construction on a contract for the sale of a *freehold* estate, they should do otherwise in respect of a contract for the sale of a *leasehold*.

The cases at law have not been numerous on the subject of contracts to grant or sell leases. That of *Gwillim v. Stone*(e) was disposed of before the subject was so much considered as it has since been in the cases in equity. Besides the points actually decided were, first, that on a contract to *grant* a lease there is no engagement necessarily

(a) 11 Ves. 337, *ante*, 42.


(b) 18 Ves. 505.

(c) 2 Meriv. 424.

(d) 9 Price, 488, *ante*, 41.

(e) 3 Taunt. 433.

arising by implication of law, that the lessor has sufficient power to grant such a lease, and should shew a good title; for the Court arrested the judgment, on the ground that it was not a good breach of an agreement to grant a lease to state, that the defendant had not shewn, and *had not* a sufficient title; and the second point decided was, that there was no contract implied in point of fact, to deliver an abstract of title on an agreement to grant a lease. In *Temple v. Brown*(a) the question arose as to the latter point, but it cannot be considered as having been decided by it. In *George v. Prichard*(b), on an agreement in general terms, to sell an existing lease, Lord *Tenterden*, C. J. was of opinion, that no contract to make out a complete title would be implied, and that the vendor, without an express stipulation, was *not* bound to produce his lessor's title; and he considered the cases in equity as deciding merely that a vendor, on a bill for a specific performance, could not compel a purchaser to take a lease without shewing the lessor's title. On the other hand, there is a decision of Lord *Ellenborough* which appears by no means unworthy of consideration. In an action for work and labour, brought by Mr. *Denew*, the auctioneer, against Mr. *Deverill*, the plaintiff in the Chancery suit against Lord *Bolton* above referred to, the defence was negligence in conducting the sale. Several witnesses proved it to have been long the constant usage of auctioneers employed to sell leasehold property to insert a proviso in the particular, that the vendor shall not be called upon to shew his lessor's title. The jury found a verdict for the defendant, with his lordship's full approbation. He thought the plaintiff guilty of gross negligence, in not adhering to the practice which, he observed, had very properly sprung up among auctioneers, to insert such a proviso. We have therefore that learned judge's opinion of the *reasonableness* of the practice, and the fact that it has so prevailed in the ordinary course of business, which is strong to shew the

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(a) 6 Taunt. 60.

(b) Ryan & Moody, 417, *ante*, 41.

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general understanding, that a vendor is bound to make out a good title in all respects, upon the sale of a leasehold, unless the contrary be expressed.

For the reasons above given, we come to the conclusion, that, unless there be a stipulation to the contrary, there is in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity; and we cannot adopt the distinction acted upon in *George v. Pritchard*.


It was, however, contended, that admitting the general doctrine, the terms of the instrument in this case (as in that of *Spratt v. Jeffery* (a)) shewed, that both parties intended to waive the question of title, and that this was to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease.

From these circumstances, and from the agreement "to take the lease and fixtures as per list," we might think it very probable that the contracting parties never thought of the title. But this cannot be stated higher than as a very *probable conjecture*: and it would be dangerous to defeat the general rule by speculations on the *possible* intention of the parties.

It follows, that the purchaser had a right to call for proof of the lessor's title, before he parted with his money, and as no title was shewn, this action for refusing to complete the purchase cannot be maintained.

Rule absolute.

(a) 5 Mann. & Ryl. 188; 10 Barn. & Cressw. 261.



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BY an order of two justices, *Samuel Bullock*, his wife and children, were removed from the parish of Great Waking to the parish of Great Wigborough, both in the county of Essex. On appeal, the Court of Quarter Sessions quashed the order, subject to the opinion of this Court upon the following case:

The respondents having proved that the pauper had acquired a derivative settlement from his father in the appellant parish, the appellants endeavoured to establish a subsequent settlement acquired by the pauper himself, either by renting a tenement in the respondent parish, or by paying rates in respect thereof, under the following circumstances:

27 Feb. 1827. By indenture of lease, between *Catherine Sumner*, widow, of the one part, and the pauper and *John Clay* of the other part, Mrs. S. demised to the pauper and *Clay* certain premises, situate in the respondent parish, to hold from 25th March then next, for fourteen years, if Mrs. S. should so long live, at the yearly rent of 16*l*. Covenant by the lessees, jointly and severally, for payment of the taxes, rates and assessments, but no covenant for payment of the rent; and previously to the 29th September then next, to lay out 30*l*. in repairs, and thereafter to keep and leave the premises in repair. It also contained a covenant by Mrs. S. to repay the 30*l*. in case the lessees should be lawfully evicted.

This lease having been read on the part of the appellants, the pauper swore that the premises were hired by him of Mrs. S., and consisted of three cottages, two of which formed one double tenement, and an acre of land; that he occupied the whole under the lease, and paid the stipulated rent for above five years, inhabiting one of the cottages and cultivating the land, and underletting the residue; that *Clay* never came near the premises during the five years,

A. demised by deed to B. and C. jointly, at 16*l*. a year. B. occupied and paid the rent and the rates:—Held, that B. did not gain a settlement either by renting a tenement or by being rated and paying the rates.

Seem, that evidence was inadmissible to shew that it was intended that B. should be the sole tenant, and that C. was merely a surety.

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or paid any part of the rent, but that he once lent the pauper money to enable him to pay the rent then due.

The appellants also gave in evidence receipts for rent, as paid by the pauper, as follows:

“Received of Mr. *Samuel Bullock* the sum of eight pounds, for a half year's rent, due Michaelmas, 1830, for houses and land in the parish of Great Waking.

Signed, *Catherine Sumner.*”

The respondents objected, that the lease constituted a joint demise to the pauper and *Clay*, at 16*l.* a year, which was not sufficient to confer a settlement under the provisions of 6 *Geo.* 4, c. 57, the act in force at the date of the demise. The appellants replied, that the liability to pay the reserved rent was, in law, several as well as joint, and they proposed to call the attorney who had prepared and attested the execution of the lease, and who had acted for all parties throughout the transaction, for the purpose of shewing that *Clay* was not *intended* to be tenant jointly with the pauper, but that it was the intention and understanding of all parties that the pauper should be sole tenant, and that *Clay* was included in the lease merely as a surety for the due payment of the rent by the pauper. This evidence was objected to, as tending to contradict the language and vary the effect of the indenture, but it was admitted by the sessions.

With respect to the settlement by payment of rates, the pauper proved that once, during his occupation under the lease, he paid a rate to a Mr. *Smith*, whom he believed to be one of the parish officers of Great Waking; and a rate made for the relief of the poor of that parish was produced, in which the pauper was assessed in the following manner: “Value of property 6*l.*, *Samuel Bullock*, house and land, six shillings.” The pauper occupied nothing else in the parish in question, and *Clay* was not rated. It was contended, on the part of the respondents, that this furnished no evidence of the pauper's having been rated and paid a rate in respect of the premises demised by the lease, and that at all events

the *value* of the property rated, as it appeared by the rate itself, was insufficient for the purpose of acquiring a settlement. The sessions were of opinion that the pauper had acquired a settlement, both by renting a tenement and by paying a rate in respect thereof, and quashed the order of removal.

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The questions for the opinion of the Court are—first, whether this was a hiring of sufficient value under the above statute; secondly, whether the evidence of the attorney was properly received; and thirdly, whether the pauper, under the circumstances above stated, acquired a settlement by payment of rates.

Knor and Cripps, in support of the order of sessions.

I. In *Croft v. Gainsford* (a) and *Rex v. Marden* (b), it was held that where two persons rent a tenement, and the rent is under 20*l.* a year, no settlement is gained. These cases were determined upon the ground, that in order to gain a settlement by renting a tenement, the party must have *credit* given to him to the amount of 10*l.* a year. That doctrine was exploded in *Rex v. Hooe* (c); and it was there settled, that it is sufficient if the party comes to settle upon a tenement of 10*l.* a year, whether credit was given to him to that amount or not. The pauper came to settle upon and occupied the whole of the premises. *Clay* never came to the premises or paid any part of the rent. The covenant to pay the rates and taxes is joint, but there is no express covenant to pay the rent. Each would therefore be jointly and separately liable to pay the whole.

First point:
Sufficient
hiring.

II. The attorney, who knew the whole circumstances of the case, was proposed to be called, to shew that *Clay* was only a surety. The Court properly admitted this testimony;

Second point:
Parol evidence
admissible.

(a) 2 Bott. 130.

S. C. 2 Bott. 134; Say. Rep. 8.

(b) 2 Burr. Sett. Cases, 311;

(c) 4 East, 362; 1 Smith, 60.

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Rex v. Scammonden (a), Rex v. Landon (b), Rex v. Olney (c), Rex v. Cheadle (d). [Denman, C. J. The distinction is, that strangers may give evidence to contradict a deed, but parties cannot (e). This is an inquiry as to what the contract was.] The attorney was called to explain, and not to contradict the deed. [Denman, C. J. He was not called

Distinction between a traverse by strangers of the operation of a deed by plea of non feoffavit, &c. and a traverse by parties and privies of the making of the deed by plea of non est factum.

(a) 3 T. R. 474.

(b) 8 T. R. 379.

(c) 1 Maule & Selw. 387.

(d) 3 Barn. & Adol. 833.

(e) Parties and privies to deeds indented are estopped from denying the operation of the instruments which they have thus solemnly authenticated. They can get rid of the effect of such instruments only by at once denying their legal existence, by a plea of non est factum. Strangers, on the other hand, who are not bound by the estoppel, and are not presumed to be consant of the operation of the deeds pleaded against them, are not bound, and are not even allowed, to plead non est factum, but must plead, according to the case,

—non concessit, H. 24 E. 3, fo. 37, pl. 2; P. 20 E. 4, fo. 1, pl. 4; *Hynde's case*, 4 Co. Rep. 71 b;

—non feoffavit, *Basset v. Prior of St. John of Jerusalem*, 18 E. 4, fo. 28, 29, pl. 27; M. 2 H. 6, fo. 2, pl. 1; *Moinell's case*, M. 10 H. 6, fo. 7, pl. 23; P. 28 H. 6, fo. 6, pl. 3; P. 12 E. 4, fo. 4, pl. 9;

—non dedit, *Reme's case*, T. 38 E. 3, fo. 20; P. 2 H. 4, fo. 21, pl. 19; Dyer, 122 b.

—non dimisit, Co. Litt. 47 b.

This mode of pleading opens to both the litigant parties a wider

field of inquiry than the precise issue raised upon non est factum. Thus the plea of non dimisit puts in issue not only the fact of the demise, but the capacity of the alleged lessor to make such demise: Co. Litt. 47 b; *Taylor v. Needham*, 2 Taunt. 282. So, where the grant of a reversion or of a remainder is alleged, the adverse party, pleading non concessit, might (before 4 Anne, c. 16, s. 7, 8,) have shewn that the tenant for life had not attorned, though he might have traversed the attornment; Dyer, 31 a; *Gourney v. Sir Edward Cleere*, ib. 31 b, in marg.; (but in *Hudson v. Jones*, 1 Salk. 90, it appears to have been held that the attornment is admitted unless it be specially traversed;) or that the grantor had nothing, or that nothing passed by the grant; *Eden's case*, 6 Co. Rep. 15 b. So, under non dedit pleaded to a gift in tail by deed, it may be shewn that the alleged donor had nothing in the land at the time of the supposed gift: *Murtaine v. Hardy*, Dyer, 122 b.

On the other hand, if an advowson be stated in pleading to have been granted by deed, and issue is taken upon the grant by a stranger to the deed, who pleads non concessit per factum, if it can be shewn that the grantor granted without deed or by a different

upon to explain any thing in the deed.] The case in this respect is analogous to *Wilson v. Hart* (a), a case referred to in *Walton v. Shelley* (b), and *Rex v. Llangunnor* (c).

III. The pauper gained a settlement by being rated and paying the rates. It may be objected that in consequence of 6 Geo. 4, c. 57, no person can gain a settlement by being rated and paying the rates, unless the circumstances of his holding were such that he could have obtained a settlement by the occupation of the same premises. But it is sufficient if the party has been rated and paid the rates in respect of a separate *occupation* by him of premises worth more than 10*l.* a year.

IV. In addition to these three questions, submitted to the consideration of this Court by the Court of Quarter Sessions, the decision of that Court may be supported upon another view of the case. The pauper may be considered as the tenant of a moiety of the premises to Mrs. S., and the tenant of the other moiety to *Clay*; *Rex v. Duns Tew* (d).

Bere, contra. It has been frequently observed, that certainty is of peculiar advantage in the laws relating to the poor. If the construction contended for upon 6 Geo. 4, c. 57, be adopted, the decision of the Court now will be at variance with decisions upon the 59th Geo. 3, c. 50, which

deed, it will be sufficient: per *Finchden, J.*, H. 43 E. 3, fo. 1, pl. 4; *Heath, Max.* 80.

But no traverse can be taken upon the *effect* of a deed. Thus, if in an action between *A.* and *B.*, *B.* pleads a feoffment by deed by *C.*, *A.*, whether party or stranger to the deed, cannot reply that *C.* died seised: H. 24 E. 3, fo. 37, pl. 2. And see 1 Wms. Saund. 23 (5).

Whether, under the plea of *riens passa per le fait*, the execution of the deed is admitted, M. 5 H. 7, fo. 8, pl. 19; Bro. *General Issue*,

pl. 38, 79; *Kitch.* 242,—and whether a stranger to the deed may have such a plea, M. 10 H. 6, fo. 7, pl. 23; Bro. *Estranger al fait*, pl. 32,—appear to be vexatæ quæstiones.

And see P. 18 E. 3, fo. 16, pl. 16; 29 Ass. pl. 56.

Here, both the contending parishes are *strangers* to the deed.

(a) 7 Taunt. 295.

(b) 1 T. R. 301, tried before and cited by *Willes, J.*

(c) 2 Barn. & Adol. 616.

(d) Burr. S. C. 398.

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Third point:
Settlement by
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Fourth point:
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is in *pari materiâ*, and for the present purpose is the same. The Court will hesitate long before they will put a different construction upon statutes which are in *pari materiâ*. This case has been decided by *Rex v. Tonbridge (a)*, for though in that case the question arose upon the 59 *Geo. 3*, c. 50, and not upon the 6 *Geo. 4*, yet *Bayley, J.*, in delivering the judgment of the Court, treated the two statutes as differing only in other respects. There, the pauper had rented and occupied premises of insufficient value, unless he could be considered as sole occupier of a garden. *Bayley, J.* says, "It is stated in the case, that though the pauper took the garden, it was agreed between him and *Maynard*, that they should share the expense and profit. It is also stated that *Maynard* paid the pauper half the rent, and that the garden was thus occupied. It is not in terms stated that there was a joint occupation, but as *Maynard* was entitled to participate in the occupation, we think it must be taken that he did, and if so the pauper cannot be considered as occupying more than a moiety of the garden. Unless the garden was separately occupied by the pauper the whole year, no settlement was obtained." Independent however of authority, there is nothing upon the modern tenement act to shew any intention that there should be any difference *in this respect* between it and the previous tenement acts. It is necessary now, as it was necessary formerly, that the party shall have been *bonâ fide* liable to a rent of 10*l.* a year independently of any other person. If the argument on the other side were correct, any number of persons taking and occupying together a house of the value of 10*l.* would be entitled to a settlement.

With regard to the question whether a settlement was gained by being rated and paying rates, it is clear that under the 6 *Geo. 4*, this kind of settlement law is repealed, because the same circumstances which are required in order to gain a settlement by occupying a tenement are

(a) 9 Dowl. & Ryl. 128; 6 Barn. & Cressw. 88.

required in the case of a settlement by payment of rates assessed upon the party.

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DENMAN, C. J.—It does not appear to me that this letting conferred a settlement, since it was a joint letting to the two. If a lease be made to *A.* and *B.* at 16*l.* rent, it imports that as between themselves each is only to pay a rent of 8*l.* a year, and though each may be liable to the landlord for the whole, yet each, for the purpose of gaining a settlement, must be considered as holding only a moiety. In this case the letting was to both; they were to pay the rent jointly, and the occupation was to be joint. The occupation being taken to be joint, each occupies less than 10*l.* a year. I do not understand Mr. *Knox* to say that the 6 *Geo.* 4 at all alters the state of the law which existed before; nor do I think that *Rex v. Hooe* is in his favour, since there the letting was to one. Whether this evidence was receivable or not makes no difference, since assuming that it was admissible the letting was to the two jointly, and therefore the rent was not of sufficient amount. As to the other ground, that *Clay* may be considered as letting his moiety to the pauper, that is not found by the sessions, and we cannot infer it.

LITLEDALE, J.—I am of the same opinion. If there had been a joint and several covenant to pay the rent, I do not see what difference it would have made, since the *demise* was to the two jointly. The letting was to the two as joint tenants. The pauper only occupied one half in his own right, and the other as bailiff to *Clay*, and he would be liable to account for that to *Clay*; he can only be considered as renting this tenement at 8*l.* a year. If he had actually made a contract with the other lessee, that would have been sufficient, but no such contract is found. With regard to the settlement by payment of rates, the same is required to confer a settlement by payment of rates, as to gain a settlement by renting the land.

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TAUNTON, J.—It is laid down, that where a tenement of the value of 20*l.* is occupied by two, both shall acquire a settlement, but where the value is under 20*l.* neither gains a settlement. The reason of this is, that if it were otherwise, the inconvenience arising from it would be intolerable; for if forty persons, for the same purposes, were to rent a tenement of the value of 10*l.*, each of them would be entitled to a settlement; the manifest design of the statute would thereby be eluded, and the parishes would be loaded with poor. In this case a settlement was not gained, because the rent for the whole was jointly payable by the two lessees, and was only 16*l.* a year. If the parol evidence were properly received, I do not think it would vary the case. It would leave the demise by the lessor on the lease the same. As to the underletting, there is no evidence at all of it. *Clay*, it would appear, was to be merely the surety, and there is no evidence to shew that he *underlet* to *Bullock*.

A settlement by rating depends on the same circumstances as a settlement by renting the land.

PATTESON, J.—It is perfectly clear that this is a joint lease as regards the landlord. Whether the parol evidence was admissible or not, it does not vary the lease as between the parties to this case. The inclination of my mind is, that it was not admissible between these parties, although between the parties to the instrument it might be so^(a). But if it be so, it does not shew that the *letting* was different; it was still a joint letting. All the old cases shew that pre-

(a) A demise by parol being in the realty, is of an equally high nature as a demise by deed. In debt for rent upon a lease for years, the action is founded upon the demise, and the deed is only evidence of such demise: therefore nil debet may be pleaded: *Warren*

v. *Consett*, 2 Lord Raym. 1500; S. C. 8 Mod 107, 323, 382. But this circumstance does not appear to exclude the operation of the rule, that where an agreement is reduced into writing, the parties shall be bound by the terms of the *written* document.

bye-law had been shewn to fourteen attorneys practising in the said city of Norwich, who then stated they knew of its existence, but several of them said that such knowledge was purely from accidental circumstances: that the same copy was produced to twenty-four other attorneys, all practising in the said city, and that every one of them then declared that they were wholly ignorant that such resolution or bye-law had been made. There were other affidavits of ignorance of the existence of the rule. The notice of entry and respite does not supersede the usual notice of trial of an appeal, but eight days' notice of trial is required to be given in addition to such notice of entry and respite.

The affidavits in opposition to the rule stated, that at the meeting of the justices at the close of the October sessions, 1830, in the grand jury room, Lord *Suffield* gave notice of an intention to submit a motion regulating the entry and respite of appeals against orders of removal at the next sessions: that at a meeting of the magistrates in the grand jury room, in the January sessions, 1831, a motion was put accordingly, and the sessions unanimously made the resolution in question. That advertisements of all these proceedings were respectively inserted in two of the newspapers by the clerk of the peace, about the time when they took place: that this was the ordinary course in making rules of court, and that the proceedings had been published in the usual manner. That ever since the making of the rule, the practice of the court has been regulated by it. That there was reason to believe that the rule was generally well known to attorneys practising at the sessions of the county of Norfolk.

Sir *J. Scarlett* and *Austin* now shewed cause. It is said that the attorney for the appellants was not aware of the rule. The two litigating parishes are situate within two or three miles of Norwich. Then it is said that twenty-four attorneys in the city of Norwich were ignorant of the rule. That is very probable, since in the city of Norwich there are peculiar

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regulations respecting the poor, which makes the knowledge of the rule of no interest to them. There is no affidavit that the attorneys resident in the county were ignorant of the rule. This is a matter entirely within the discretion of the court. The sessions have a right to make such rules regulating the practice of their court as they think proper, provided they be not unreasonable, in which case this Court will hold them void. The rule in question is one of obvious convenience to the respondent parish, and no hardship upon the appellants. (Here they were stopped by the Court.) [*Denman*, C. J. The only question can be, whether the rule is contrary to law.]

Follett and *Palmer*, in support of the rule. If justice has not been done, this Court will interfere with the proceedings of the court below. This appeal was entered and respited at the Epiphany sessions. The usual course there, is to give a reasonable notice of trial before the next sessions. In this case, before the last rule of the Court of Quarter Sessions, the appellant was bound to give eight days' notice of trial. Such a notice was given in this case; and when the appellants came to the sessions to try the appeal, it was dismissed, on the ground of non-compliance with a rule requiring notice of entry and respite to be given within one calendar month afterwards. The sessions had no power to make this rule; for it deprives the appellants of the benefit of the provisions of an act of parliament, giving them the right of trying their appeal, upon giving reasonable notice of their intention so to do. *The King v. The Justices of Wiltshire* (a) is very similar to this case. There the appeal was entered at the April sessions, notice of appeal having been previously given. Subsequently a new rule of practice was promulgated, by which notice of trial was to be given on or before the Monday in the week next before the sessions. The promulgation of the rule was not

(a) 10 East, 404.

known to the attorney of the appellants, but for want of this notice the appeal was dismissed. The Court of K. B. however issued a mandamus to the sessions to hear the appeal; and Lord *Ellenborough* said, "Here it appeared that a new rule of practice with respect to giving notice had been recently made by the sessions, of which the appellants' attorney had no knowledge, but he conformed himself to the former practice; and under these circumstances it would be too much to conclude the appellants from having the case heard." There are a variety of cases in which this Court has interfered with the decision of the Court of Quarter Sessions, where justice has not been done: *Rex v. Justices of Lancashire* (a), *Rex v. Justices of Essex* (b), *Rex v. Justices of West Riding of Yorkshire* (in re *Joshua Bower*) (c), *Rex v. Justices of West Riding of Yorkshire* (d). Even if the sessions had power to make the rule, this Court will interfere to see that justice is done in the individual case. The sessions ought to have adjourned the case. [*Denman*, C. J. The statute (e) declares that no appeal shall be proceeded in unless reasonable notice be given, and that the reasonableness of the notice shall be determined by the justices of the peace at the quarter sessions at which the appeal is made, and if reasonable notice is not given, then the appeal is to be adjourned.] The Court of Quarter Sessions are to adjourn the appeal, and not to dismiss it: *Rex v. Justices of Buckinghamshire* (f). [*Patteson*, J. If the Court of Quarter Sessions have only power to adjourn the appeal, the rule would be utterly useless. *Denman*, C. J. The appeal might go on for ever, by being adjourned constantly from one sessions to another.] An adjournment could not take place at the second sessions. The attorney of the appellant swears that he was ignorant of the rule; and it was only advertised once,

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(a) 7 Barn. & Cressw. 691.
 (b) 2 Chit. Rep. 385.
 (c) *Ante*, vol. i. 426; 4 Barn. & Adol. 685.

(d) *Ante*, vol. ii. 390.
 (e) 9 Geo. 1, c. 7, s. 8.
 (f) 3 East, 342.

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and then it was placed at the conclusion of a very long advertisement. The rule, in effect, causes two notices to be requisite instead of one.

DENMAN, C. J.—The last ground is a very striking one. The Court of Quarter Sessions are to judge of the reasonableness of the notice; but the statute does not authorize them to require two notices. This practice is sworn to, and is illegal. It might be a good legislative enactment, but the statute only requires one notice. The inconvenience of imperfect notices does not arise, since the reasonableness of the notice is, by the statute, to be determined by the justices of the peace at the quarter sessions to which the appeal is made; and if it shall appear to them that reasonable notice was not given, then they are to adjourn the appeal to the next sessions, and then finally determine the same. This Court would be very slow in controlling the discretion of the justices where that discretion has been fairly exercised. At the same time I must say, that I think it desirable that the Court of Quarter Sessions should not frequently vary their rules, and they should rather incline to hear the merits of an appeal than dismiss it on technical objections.

LITTLEDALE, J. concurred.

TAUNTON, J.—I entertain very considerable doubt upon the points which have been discussed. We have, I think, nothing to do with the promulgation of the resolution of the Court of Quarter Sessions. It is a rule of that court. *The King v. The Justices of Buckinghamshire* has been quoted. That decision, however, has nothing to do with the present case. That case turned on the provisions of 9 Geo. 1, c. 8, and the provisions of that statute do not apply to the sessions after the appeal has been entered and respited. That statute does not therefore apply to this

case, but only to the sessions to which the appeal is made. The case which has been the most pressed, and which I think the nearest to this, is *The King v. The Justices of Wiltshire*, but between that case and this there is a very material difference. Here the rule was made at the Epiphany sessions in 1831, and was published in two newspapers shortly afterwards. We should not, I think, look with eagles' eyes at the advertisement. Whether it was placed in a corner of the newspaper or printed in small type is immaterial: it is sufficient for the purpose of notoriety that it is published. It was a rule of court, and it was the duty of an attorney practising in that court to know the practice. I do not feel the argument which has been pressed of the ignorance of the attorney. I should be sorry to lay down the proposition that the attorney is not to obey the rules of court because he does not know them, particularly now that so many rules of this Court have been published. This rule was made two years before the appeal was entered. In *The King v. The Justices of Wiltshire* the appeal was entered in April, and the rules were published after the April sessions. Therefore the two cases are very different. The exercise of discretion must be governed by the particular circumstances of each particular case. I have stated thus much that it may not be thought that I adopt the arguments which have been urged to-day.

The last objection is decisive. Here it appears there was a rule in force at the sessions in question, by which a notice of the entry is required as well as the notice of appeal. The Court of Quarter Sessions had no authority to make that rule; and it follows therefore that they had no right to refuse to hear the appeal on that ground.

PATTESON, J.—I think that the mandamus should issue upon the last ground. I do not at all mean to say that it might not issue upon the other. Here the old notice is

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continued and another required. The court might as well have made a rule that notice should be given from day to day.

Rule absolute.

The KING v. The Inhabitants of OULTON.

A daughter of full age, in 1829, hired herself with the consent of her father, with whom up to that time she had lived, to a farmer at weekly wages to work for him during harvest. She remained with the farmer three weeks, and then returned to her father. In the following year the daughter hired herself again to the same farmer to assist in the harvest, and the father on this occasion received the wages from his daughter on her return. On both occasions, a returning home as soon as the harvest should be over, was intended by the daughter, and expected by the father.

UPON an appeal against an order of two justices for the removal of *Hannah Barnes*, a single woman with child, from the parish of Aikton in the county of Cumberland, to the township of Oulton in the same county, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case :

John Barnes, the father of the pauper, was born in the township of Oulton, and had a settlement there until the year 1830, when he acquired a settlement by estate in the parish of Aikton, the pauper being at that time living with her father as part of his family.

The pauper was born in the year 1806, she had never gained any settlement in her own right; she had once before the present removal, namely, in 1827, being then of age, gone to her sister's in Oulton to lie in of a bastard child; and remained there until she was recovered, her father paying the expenses, and then returned to her father's; but excepting on that occasion, always up to the time of the removal, lived with her father as part of his family. She did the work of her father's house, and before and at the time of the appeal was the main support of his family. In the autumn of 1829, the pauper being then of the age of 23 years, with the consent and at the desire of her father, hired herself to one *William Wilson*, residing at some miles distance in an adjoining parish, at weekly wages, to work for him during his harvest; she remained living with *Wilson* and working for

Held, that the daughter was emancipated, per *Denman*, C. J., *Taunton*, J. and *Patteson*, J.; dissentiente *Littledale*, J.

Semble, When a child is of age, emancipation is to be *prima facie* presumed; the contrary when the child is under age.

him under the hiring, for three weeks and upwards, when she received her wages and returned home, having been absent from her father's house three weeks and two days.

In the following autumn she hired herself again with the consent and at the desire of her father to the said *William Wilson*, to assist him in his harvest; on this occasion she served *Wilson*, living with him under this hiring a fortnight, received her wages, and returned home as before, having been absent from her father's house at this time two weeks and two days. On this latter occasion she gave her wages to her father, who expended them for the use of the family. The pauper had not on either of these occasions any intention of abandoning her home, but on both occasions she fully intended to return, and her father expected that she would return to him, as soon as the harvest work at *Wilson's* was done.

The Court of Quarter Sessions, upon these facts, found that the pauper was emancipated, and did not follow the settlement acquired by her father in Aikton in 1830.

The question for the opinion of the Court is, whether the sessions were warranted in the conclusion they have drawn, that under such circumstances the pauper was by these hirings, or either of them, in point of law emancipated. If they were, the order to be confirmed; if not, to be set aside.

Armstrong, in support of the order of sessions. The pauper was emancipated. She was more than 21 years of age, and by entering into a contract of hiring and service, although only for a short period, she was severed from her father's family, and no longer subject to his control; *Rex v. Roach (a)*. It is true she intended to return, but the case cited shews that to be immaterial. The intention of the child is unimportant: if there be a period during which the child, being of age, is not under the control of the parent,

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emancipation takes place. *Rex v. Sowerby* (a) will probably be cited to show that a child is not emancipated by an absence during harvest time, but in that case the child had not entered into a contract inconsistent with the control of the parent.

Aglionby, contra. If the party in this case is emancipated, a child who works for daily wages, under a contract of hiring, must also be holden to be emancipated. The question of emancipation depends upon the intention of the child to sever itself from the family of the parent; *Rex v. Rotherfield Greys* (b), *Rex v. Hardwicke* (c). In *Rex v. Sowerby*, *Grose*, J. said that there is no pretence for saying that the pauper's going out for a few weeks at harvest time would operate as an emancipation. In *Rex v. Roach* it was considered that the daughter was emancipated, because she went abroad into the world to seek her own livelihood with the intention of separating herself from her father's family. In this case the daughter was the support of her father's family. She lived with her father, gave him her wages, hired herself with his consent, and fully intended to return. As emancipation depends upon intention, there was no emancipation in this case.

DENMAN, C. J.—It appears to me that in this case the sessions have done right in finding that the daughter was emancipated. The daughter and father are upon very good terms, but she was 21 years of age, and it was at her option whether she would give her wages to her father or not. *Rex v. Lytchet Maltravers* (d), and some other cases, shew that if she had hired herself when under age and had returned when of age, she would have been emancipated. It can make no difference that she had hired herself after she was twenty-one, and the length of service can make no distinc-


(a) 2 East, 276.

(c) 5 B. & Ald. 174.

(b) 2 Dowl. & Ryl. 628; S. C.
 1 Barn. & Cressw. 345.

(d) 1 Mann. & Ryl. 25; 7 Barn.
 & Cressw. 226.

tion. We are extremely anxious to make the rules on this subject as clear as possible. There is a material difference between the case where the child is of age and where it is under age. When the child is of age, if any independent act has been done by her, emancipation takes place, and the burthen of proof lies upon the party contending that the child is not emancipated. In *Rex v. Hardwicke*, Lord *Tenterden*, C. J., lays down this rule: "During the minority of the child he will remain almost under any circumstances unemancipated; but where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated, unless in fact the child continues part of the family. Where, therefore, at that period he is absent employed in gaining a livelihood for himself, I think he no longer remains a member of the family." In this case the daughter was employed in gaining a livelihood for herself, and therefore was emancipated.

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LITLEDALE, J.—It appears to me that the pauper was not emancipated. When above twenty-one years of age, she, with the consent of her father, hired herself out on two occasions for the harvest: on each occasion, as the case also finds, she intended to return, and her father expected that she would return. At the commencement of the harvest, many persons hire themselves for the harvest without any intention of emancipating themselves. Here the family were maintained by the daughter, and for anything that appears to the contrary, the bed which she occupied at her father's house was kept for her. It might as well be contended that if she went out for the day to work as a char-woman, she would cease to be a member of the family. There are expressions used by Lord *Kenyon* in *Rex v. Roach*, in favour of this view of the case; and *Ashurst*, J., who was a great sessions lawyer, says, "When a child becomes of age, it is optional in him either to continue with his parents, or not, as he pleases. He is then *sui juris*; and if he leave his father's house and put himself

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under some other control, this is a kind of public notification that he intends to leave his father's family." Here the service was of a temporary nature, and it was to do harvest work, not household work. It was merely occasional service, and she was not out of the control of her father. *Rex v. Sowerby* arose on a certificate, and although different from the present case, the observation of *Grose, J.* is applicable.

TAUNTON, J.—Certainty, in the administration of every branch and department of the law, is of the greatest importance; but if it be of importance in any, it is more especially so in sessions law. I have no hesitation in saying, that prodigious expense is incurred in splitting hairs upon questions of this description. I cannot distinguish this case from *Rex v. Roach*. I do not trouble myself to inquire whether that case was well or ill decided since. I see in it no contravention of any principle of law; if there were, I might think it right to reconsider it. I will read the circumstances in that case. "The pauper, when she was twenty-two years of age, was delivered of a bastard child, for the maintenance of which a bond was given to the parish officers of Roach, and she continued still living with her father. About half a year afterwards she left her father's house, went to a farmer's in the parish of Roach as a wet nurse, and lived there eight weeks, for which she was paid 8s. At the expiration of eight weeks she returned to her father's." Here, the pauper being twenty-three, by the consent and at the desire of her father (and of course every parent in the situation of life of these persons would consent to their children going out to obtain an honest livelihood by their own labour,) went to work with him during the harvest, not to work at harvest work. It is by no means an uncommon thing to hire some other persons to do the work of the house during harvest time, in aid of the persons who are in the service. The case states that the pauper was *hired during the harvest*. She lived with her master during the whole

time as well by night as by day; she remained living and working with him for three weeks and two days. It is stated that she received her wages, on the first hiring, but it is not stated what she did with them. We are consequently at liberty to suppose that she kept them for her own use. In what, therefore, does this case differ from *Rex v. Roach* (a)? In the one the daughter went away for eight weeks, in the other for three weeks. If she is emancipated by eight weeks, she is so by three weeks. If she is not emancipated, I know not where the "filum" is to be placed. Being of opinion that certainty is of the greatest importance, I think this ought to be considered a case of emancipation.

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PATTESON, J.—I cannot distinguish this case from *Rex v. Roach*. There the absence was for eight weeks, here it was for three. Under the contract the master might have obliged her to be absent from home, and might legally have compelled her to remain with him. It is said she entered into the contract with the assent of her father; but he could not have compelled her return, as she was of age. The distinction is broadly laid down in several cases between the case where the child is of age, and the case where the child is under age. When the child is of age, the onus is thrown on the other side to prove that such child was *not* emancipated. *Rex v. Sowerby* did not turn on the question of emancipation. The point there was, whether the son was residing with his mother under the certificate. The conclusion to which the Court came, in the case of *Rex v. Sowerby*, is therefore not a decision contrary to that in the case of *Rex v. Roach*.

Order of Sessions confirmed.

(a) 6 T. R. 247; *ante*, 63, 65, 66.

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The KING v. The Justices of BUCKINGHAMSHIRE.

The Court will not issue a mandamus to magistrates to do an act subjecting them to an action, of which the event may be doubtful.

Whether the owner of a farm composed partly of grass land, who, upon the determination of a lease, takes possession of the farm by a servant, who occupies it for the purposes of protection, but without dealing with the land, is liable to be rated ratable to the poor as a party beneficially occupying; *quære*.

THESIGER, in this term, obtained a rule calling upon two justices of the county of Buckingham to shew cause why a mandamus should not issue to them, commanding them to make and issue their warrant of distress for levying upon the goods of *A. Baines*, clerk, the sum of 9*l.* 4*s.* 4*d.* rated and assessed upon him for the relief of the poor of the parish of Adstock, in the said county.

From the affidavits it appeared that Mr. *Baines*, the rector of Adstock, had been rated at 9*l.* 4*s.* 4*d.*, in respect of a farm, being part of the glebe. Upon refusal to pay this rate, he was summoned before the magistrates of Bucks to answer the complaint of the churchwardens &c. of Adstock, and upon the inquiry before the justices, the question whether or not the farm was in Mr. *Baines*'s occupation being raised, evidence to the following effect was given.

For some years the farm had been in the occupation of one *Coles*, as tenant under a lease, which would not expire until April, 1835, at the rent of 175*l.* 10*s.* On the 11th of October, 1833, it was agreed between *Coles*, (who desired to relinquish the farm and lease,) and Mr. *Baines*, that in consideration of *Coles*'s paying the arrears of his rent up to that time, and paying in addition 44*l.*, being about one quarters' rent, and also leaving upon the farm certain buildings erected by him at his expense, and abandoning his claim as an off-going tenant, for the usual remuneration for fallowing and acts of husbandry, Mr. *Baines* should accept a surrender of the lease. This agreement was in all respects executed. On the same day *Coles* delivered the key of the farm-house to a labourer sent by Mr. *Baines*, which labourer had from that day continued to reside in it, for the purpose of protecting the buildings on the farm, but without doing any other acts of occupation upon the lands. *Coles* swore that if he had been appraised out of the farm in the customary way, his claim upon the landlord, Mr. *B.*, would have amounted to about 40*l.*, and that at the time he quitted the

farm he considered the herbage and keeping of 80 acres of grass land and 32 acres of arable land, then having a crop of clover, from thence to the time when the lease was to have expired, would have been worth about 60*l*. It was under these circumstances that Mr. *Baines* was rated for an occupation subsequent to the 11th of October. The justices entertaining a doubt whether, upon the evidence, an occupation by Mr. *Baines* (as by law in such cases required) had been proved, declined granting a warrant of distress, which was prayed of them by the churchwardens &c. of Adstock. In the course of the same term, against this rule,

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Adolphus shewed cause. The 44*l*. which the tenant paid, and the rights which he relinquished upon quitting the tenancy, were the price which he paid for being allowed to do so before the expiration of the term for which he had engaged to hold the premises, and probably also for dilapidations. The overseers chose to consider this as rent paid in advance, so as to constitute a beneficial occupation on the part of Mr. *Baines*. Not one act has been done to evidence a beneficial occupation by Mr. *Baines*, and the magistrates have thought that no such occupation was established. The Court will not compel the magistrates to do that which is against their judgment, in a matter in which the act of parliament has given them a discretion, although if they had refused to hear the complaint of the churchwardens &c., a mandamus certainly might issue. A mandamus was granted formerly to compel magistrates to issue warrants of distress; but that was when magistrates acted ministerially only.

Thesiger, contra. It is of very frequent occurrence to issue a mandamus to magistrates requiring them to grant a warrant of distress. [*Littledale*, J. Such applications used to be refused.] *Rex v. Justices of Middlesex* (a). In *Rex v. Justices of Buckinghamshire* (b), the Court would have granted the rule, had they not considered that their decision would

(a) 2 Kenyon, 163.

(b) 2 Dowl. & Ry. 689; 1 B. & C. 485.

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certainly involve the magistrates in an action in which a very doubtful point of law would be raised; *Chanter v. Glubb* (a). The only question here is, whether there *can be any doubt* whether this is an occupation in respect of which Mr. *Baines* was ratable. It is said that the overseers attempt to set up the agreement between Mr. *B.* and his tenant, and the acting upon it as amounting to a receipt by Mr. *B.* of a kind of profit rent. No such attempt is made. The tenant paid rent only up to the 11th of October, 1833, and the rate is made after that time for an occupation by Mr. *B.*, commenced under these circumstances. The farm was quitted by the tenant, and of course, for all ordinary purposes, the occupation of the landlord commenced. The landlord sent a servant in husbandry, who merely continued there to take care of the property; but inasmuch as Mr. *B.* derived a benefit from this occupation, from that time he was liable to be rated. [*Taunton, J.* That is the question,—whether there was an occupation beneficial to the landlord *for which he was liable to be rated?* It does not follow that because the tenant ceased to occupy, the landlord became the occupier.] It would afford great opportunities for evasion if a landlord, upon losing his tenant and putting in his servant, should be permitted to say that he was not in the occupation. Here, too, there is grass land, the grass upon which was growing for the benefit of Mr. *Baines*. He can neither say that he did not occupy, nor that he did not derive a benefit from the occupation. [*Taunton, J.* Is not this a case in which the justices are authorized to decide whether there has been such a beneficial occupation as would make the party liable? Granting that the Court will interfere in the way contended for, it must be in a very clear case.] This is a clear case. Mr. *Baines* ought to be rated to the extent of the benefit of his occupation, although certainly not to the same amount as if he had a good tenant. It cannot be said that the occupation of grass land is of *no* benefit, and the question is not as to

(a) 4 Mann. & Ryl. 334; 9 Barn. & Cressw. 479.

the quantum of benefit, but whether the party receives any benefit at all. The proper tribunal for deciding whether this was a beneficial occupation, is the sessions; to which Mr. *Baines* might have appealed if he thought himself aggrieved, and not the justices, otherwise than at sessions. The party has allowed the sessions to go by without appealing. [*Littledale, J.* I suppose you admit that if we were to grant a *mandamus* and the justices were to issue a warrant of distress, they would be liable to damages and costs in an action by Mr. *Baines*, in case he should turn out to be right.] That appears not to be doubtful, *Marshall v. Pitman*(a). Upon the question whether this is an occupation in respect of which the landlord is ratable, it must be remembered that there is a great difference between unoccupied houses, and houses and *lands* untenanted. In *Newling v. Pearse*(b), it was held that the landlord was to be considered to be liable to pay a corn rent, which, under an inclosure act, had been directed to be paid in lieu of tithes, in respect of a period during which the lands were uncultivated and untenanted. [*Taunton, J.* The corn rent was payable in respect of the property, but the poor-rate in respect of the occupation.]

DENMAN, C. J.—No instance is shewn in which magistrates have been required to issue a warrant to levy a rate, where they have exercised their judgment as they have done here. They are called upon by this rule to do the opposite of what, in their judgment, is right; and therefore I think it must be discharged.

LITLEDALE, J.—I think we ought not to grant this rule to compel magistrates to do that which will make them run the risk of having an action brought against them.

TAUNTON, J.—I have already intimated my doubts upon

(a) 9 Bingham 595; 3 Moore & Scott, 745. (b) 2 Dowl. & Ry. 607; 1 Barn. & Cresswell 437.

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1834. this question, and those doubts are so strong that I think we ought not to grant this rule.

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BUCKS. PATTESON, J. concurred.

Rule discharged (a).

(a) Under the Reform Act (1 & 2 W. 4, c. 45, s. 27,) the question has frequently arisen, whether a landlord, who enters upon the expiration of the term, without the intention of cultivating the land or of retaining it in his own hands, acquires the privilege or incurs the disabilities attached by the act to the character of occupier.

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The KING v. The Inhabitants of BUCKINGHAM.

A contract by which a servant hires himself to a master as a footman and groom is not dissolved by a subsequent contract by which he engages to bind himself to serve in a different character, at higher wages and in a foreign country, although the servant accompanies his master into such foreign country, the service performed abroad being the same as that originally contracted for.

UPON appeal against an order of two justices, by which *Thomas Burnell*, his wife and two children, were removed from Maidsmorton to Buckingham, the Court of Quarter Sessions quashed the order by consent as to the daughter *Sarah*, and confirmed it as to the other paupers, subject to the opinion of this Court on the following case.

The birth-settlement of the pauper *Thomas Burnell* was in Buckingham.

On the 28th February, 1828, he was hired by Mr. *Smithson*, then residing at Maidsmorton, as a *footman* and *groom* for a year, at the wages of 7*l.* and a complete suit of livery; he went into the service on the following day, and continued therein at Maidsmorton until the 9th of May following, when Mr. *Smithson*, who was a West India planter, being about to visit his property in Berbice, came to an agreement with *Burnell*, which was reduced into writing, and is as follows:—

“ Buckingham, 9th May, 1828.

“ An agreement entered into between *Thomas Burnell*, of Buckingham, on the one part, and *H. Smithson*, Esq. of Berbice, on the other part; viz. The first named, *Thomas* A servant, by accompanying his master into a foreign country during a portion of the year for which he had contracted to serve, (the service abroad being referable to the yearly hiring,) is not thereby disabled from acquiring a settlement by service in England.

Burnell does engage to bind himself to serve *H. Smithson*, Esq. in Berbice, as overseer and clerk on his plantations for the term of three years from the first day of his arrival in Berbice, at a salary for the first year of fifteen pounds, for the second year of twenty pounds, and for the third year thirty pounds, current money in Berbice.

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“The second-named, *H. Smithson*, does promise to pay the above money as it becomes due, the first-named doing his duty, and further to find him in board, lodgings, and doctor’s charges, as is usual or customary for overseers in the Colony of Berbice aforesaid.”—Signed by both parties.

Mr. *Smithson*, on the preceding day, paid *Burnell* the sum of 1*l.* 16*s.* 9*d.* being the amount of three months’ wages, at the same time taking a receipt as follows :—

“Received, the 8th day of May, 1828, of *H. Smithson*, Esq. one pound sixteen shillings and ninepence, the amount of three months’ wages.
“ Thomas Burnell.”

1*l.* 16*s.* 9*d.*

Burnell continued with Mr. *Smithson* at Maidsmorton until 12th May, and on that day went with him to London, where they continued until 20th May, when they embarked for Berbice. *Burnell* acted in the capacity of servant to Mr. *Smithson* during his stay in England, after he had quitted Maidsmorton, and during the voyage. They arrived at Berbice on 10th August following. Mr. *Smithson*, a few weeks after landing, remained at a friend’s house, and *Burnell* lived with him as a servant; after which they proceeded to Mr. *Smithson*’s plantation at Berbice; *Burnell* then entered upon the office of overseer and clerk, and acted also as servant about the person of his master, and lived in his master’s house. This continued until February following, (1829) when Mr. *Smithson* having declared his intention of returning to England, *Burnell* expressed his desire to return also. Mr. *Smithson* at first objected to it, but ultimately consented, and *Burnell* did accordingly accompany his master to England, acting in the capacity of his servant as on the outward voyage; they landed in London on the 10th May in the same year, and *Burnell* continued with Mr. *Smithson*

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in London until the 14th, on which day they returned to Mr. *Smithson's* residence at Maidsmorton, and *Burnell* continued to act as Mr. *Smithson's* servant in his house until 1st June, without anything having passed as to hiring or terms of service. Three or four days previously to the 1st June, Mr. *Smithson* told *Burnell* he meant to give him 20*l.* as his salary up to that time, of which he then gave him 10*l.* and promised him the remainder whenever he should want it. On said 1st June *Burnell* was married, and in the morning of that day (and previously to the marriage taking place) Mr. *Smithson* and *Burnell* came to an agreement for the service of the latter as a weekly servant at 4*s.* per week, to live and board with him in the house. *Burnell* continued in such service until September following, and then left, and received the remaining 10*l.*, his weekly wages having been regularly paid. *Burnell* was never absent from Mr. *Smithson's* service a day from its commencement in February, 1828, to its termination in September, 1829. The whole amount of the wages received by *Burnell* for his service to Mr. *Smithson* was the said sums of 1*l.* 16*s.* 9*d.*, 20*l.*, and the weekly wages after the marriage.

The question for the opinion of the Court is, whether, under the circumstances above stated, *Burnell* gained a settlement in Maidsmorton?

Monro in support of the order of sessions. There has been in this case no service under the yearly hiring; for the first hiring was dissolved by the second agreement. Both hiring and service must concur. The service under this hiring was to be performed in Berbice, where the poor laws do not apply. This case has already been decided by *Rex v. Great Chilton (a)*, in which *Lawrence, J.*, said, "The question in the present case is, whether or not there was a dissolution of the first contract, and not whether or not there was a discontinuance of the service; for in *Rex v. St. Giles's, Reading*, the pauper continued all the time in the master's service; and there is no difference in this respect, whether

(a) 5 T. R. 672.

the contract be put an end to by flux of time or by agreement."

It is true that Lord *Kenyon* in that case differed from the rest of the Court; but he put his decision on the ground that there was in fact no dissolution of the first contract.

[*Denman*, C. J. What are the words in the contract of the 9th May which operate to dissolve the former contract ?]

There are no express words, but the contracts are totally inconsistent, both the nature of the service and the amount of wages being different. If the master, after the 9th May, had attempted to enforce the former contract, the second contract would have been an answer to his claim. [*Denman*, C. J.

By the second contract the servant only *engaged to bind himself to serve Mr. Smithson* in Berbice, as overseer and clerk of the plantations.] An action might have been brought upon this contract if the servant had refused to serve; the words are sufficient to create the relation of master and servant.

[*Taunton*, J. This is throwing upon the Court an adjudication upon mere matters of fact which the sessions ought to have decided themselves.] The second contract is a contract to serve in a foreign country. The parties, when they entered into it, by so doing dissolved the former contract.

Biggs Andrews, contra, was not called upon to argue.

DENMAN, C. J.—The argument of Mr. *Monro* is, that the effect of the second contract is to put an end to the first. It seems to me, however, that it does not do so. The second contract is only an undertaking on the part of the pauper that he would become the servant. That undertaking he was never called upon to perform; consequently the original contract continued, and the second never came into operation at all. There is forty days residence under the first contract, and therefore I think a settlement was gained in *Maidsmorton*.

LITLEDALE, J.—If the agreement on the 9th May had been carried into effect, it might have been a different thing; instead of that, it never was carried into effect, but

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Burnell continued to serve in the same way as before. He was a servant in the family at Berbice. He might have been called upon to execute a new contract, but he never did so. It seems very clear that the original contract continued. The time of his marriage was above a year after the first contract was entered into.

TAUNTON, J.—The argument is, that the first contract was vacated by the second; and for the purpose of shewing that it is so, *Rex v. Great Chilton* (a) was cited, with respect to which I may be permitted to say, that much as I respect the authority of Lord *Kenyon*, (and no one can hold the authority of that great Judge higher than I do) I should be disposed to concur with the opinion of the other judges. That case differs most materially from this. There the party being unmarried hired himself as a farm servant for a year; and if he had staid a whole year upon that contract, he would have gained a settlement; but during the course of the year he agreed with his master, (it was not merely an executory contract, but he actually *agreed* with his master) for a year *from that time*, which are the material words there, at weekly wages and at a higher rate. There the Court held properly, that the second contract being inconsistent with the first, the necessary consequence was, that the latter put an end to the former. Here, that is not so; all the servant does here is to bind himself to serve: he does not actually enter in another contract, but merely binds himself to do so. He merely enters into an agreement afterwards to be completed. It is not immaterial to see that when the parties arrive in the West Indies he serves in the character in which he was originally hired. I do not think that the service abroad is necessarily inconsistent with the first hiring. Then there was clearly a service of forty days under that hiring. I know of no decision in which it has been held that the mere circumstance of the master's going abroad destroys the settlement of the servant, if the service is referable to a yearly hiring. Here, the service is clearly

(a) 5 T. R. 672.

referable to the first contract; and I think the circumstance of the service being partly performed in a foreign country of no consequence at all.

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PATTESON, J.—The question turns entirely on whether the first contract was determined or not. I think the sessions have found the contrary; they have found that he acted all the time he was in the West Indies *as a servant*, and that he so continued to do all the time until he came home. Now, the second contract says nothing of such a service, therefore that service could not be under that contract, but under the first.

Order of Sessions quashed.

—◆—

The KING v. The Inhabitants of BISHOP WEARMOUTH.

UPON an appeal by the township of Bishop Wearmouth against an order directed to the churchwardens and overseers of the poor of the township of Botchergate, in the parish of Saint Cuthbert, Carlisle, in the county of Cumberland, and to the churchwardens and overseers of the poor of the *parish* of Bishop Wearmouth, in the county of Durham, and to each and every of them, for the removal of a pauper and his family from the said township of Botchergate, to the said *parish* of Bishop Wearmouth,

The *parish* of Bishop Wearmouth consists of seven *townships*, separately maintaining their poor.

One is called Bishop Wearmouth, and another Bishop Wearmouth Panns.

A pauper whose settlement was in


Bishop Wearmouth Panns, was removed to the *parish* of Bishop Wearmouth. The pauper was taken with the order, and delivered to the overseer of the *township* of B. W. P. He objected to take him, unless a demand for expenses was waived. This was refused, and the pauper was taken away. The churchwarden of the *parish* of Bishop Wearmouth was subsequently served with the order, and the pauper delivered to him. He carried the pauper to the workhouse of the township of Bishop Wearmouth, where he remained :

Held: First, that service on one of the churchwardens of the *parish* of Bishop Wearmouth was insufficient, being service upon a mere stranger.

Secondly, that the sessions should have quashed the order.

Thirdly, by *Denman, C.J., Littledale, J.*; dubitantibus *Taunton, J.* and *Patteson, J.*, that the inhabitants of the *township* of Bishop Wearmouth might appeal against this order, although they were not bound to maintain the pauper under it.

Semble, that the order could not be amended by substituting the word *township* for *parish*.

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the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case :


The order of removal was made on the 28th day of March, 1829, and the execution of it duly suspended on account of the sickness of the pauper's wife; the suspension was taken off on the 12th day of September, 1829, the pauper's wife having in the meantime died, and a further order was then made by the magistrates on the churchwardens and overseers of the poor of the said parish of Bishop Wearmouth to pay the sum of 5*l.* 7*s.* 6*d.*, being the expense incurred by the suspension of the said order of removal, to *A. B.* overseer of Botchergate, *William Kidd*, or *Luke Kidd*, upon demand, the said *Luke Kidd* being the overseer of the township of Botchergate, and father of the said *William Kidd*.

The parish of Bishop Wearmouth consists of *seven different* townships, each maintaining its own poor separately, and having separate and distinct overseers of the poor. Two of these townships are called *Bishop Wearmouth* and *Bishop Wearmouth Panns* respectively, and in the latter, namely, the township of Bishop Wearmouth Panns, the pauper and his family were legally settled at the time. There are no overseers of the poor of the *parish* of Bishop Wearmouth. When the order of removal was made, both the magistrates signing the same, and the overseers of the removing township, knew of the division of the parish of Bishop Wearmouth into townships, each maintaining its own poor, and that the pauper's settlement was in the township of Bishop Wearmouth Panns, though by and in the order of removal it was declared and judged by them to be in the *parish* of Bishop Wearmouth. The suspended order was not served till after the suspension was taken off, namely, on the 28th September, 1829. The pauper and his children were taken by the said *William Kidd* from the removing township to the township of Bishop Wearmouth Panns, with directions from the over-

seer of Botchergate to serve the order on, and deliver the paupers to the overseer of the township of Bishop Wearmouth Panns, and to demand from him the sum of 5*l.* 7*s.* 6*d.* The said *William Kidd* accordingly, on the said 28th day of September, took the paupers to the township of Bishop Wearmouth Panns, saw the overseer there, to whom he delivered the order, and demanded from him the said sum of 5*l.* 7*s.* 6*d.* The overseer of Bishop Wearmouth Panns stated, that he believed the settlement of the paupers was in that township, but as the removal order was not directed to the overseers of that township, but to the churchwardens and overseers of the poor of the parish of Bishop Wearmouth, he objected to it on account of its informality. After some further conversation between the parties, the overseer of the township of Bishop Wearmouth Panns ultimately agreed, in order to save further expense and trouble, as he had no doubt of the paupers' belonging to Bishop Wearmouth Panns, that he would waive the objections he had taken to the order if the overseer of the removing township would consent not to call upon him for the 5*l.* 7*s.* 6*d.* This proposal however not being acceded to, *William Kidd* (to save expense) took the paupers to the workhouse of a neighbouring and distinct parish, leaving them as boarders, and returned home, taking with him the removal order. The paupers remained till the 22d of October following, when the said *Luke Kidd*, the overseer for the removing township, having paid for their board, took them with the same order to the same overseer of Bishop Wearmouth Panns, as before, and again attempted to prevail upon him to accept the paupers and pay the money. This however he refused to do, for the same reasons he had before assigned, acknowledging at the same time that the paupers belonged to his township: whereupon the said *Luke Kidd* took the order to Mr. *William Hills*, one of the churchwardens of the whole parish of Bishop Wearmouth, and who resided in the township of Bishop Wearmouth, and informed him of what had passed

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as to the refusal by the overseer of Bishop Wearmouth Panns to receive the paupers. Mr. *Hills* accompanied *Luke Kidd* to try to prevail on the overseer of Bishop Wearmouth Panns to take the paupers. They found him at his place of business, situate in a distinct parish (Sunderland), but he still refusing to receive the paupers, *Luke Kidd*, the overseer of the removing township, served Mr. *Hills*, the churchwarden of the whole parish of Bishop Wearmouth, with the removal order, *Hills* being then in the parish of Sunderland, and the paupers were lodged by him in the workhouse of Bishop Wearmouth township, and maintained by that township till the appeal was heard.

It was objected by the counsel for the respondents, that the churchwardens and overseers of the township of Bishop Wearmouth had no right of appeal, and were not entitled to be heard; but the Court of Quarter Sessions determined that they were parties aggrieved, and were entitled to appeal.

The questions for the opinion of the Court are :

First point:
 Competency
 to appeal.

First, whether the township of Bishop Wearmouth was, under the circumstances, entitled to appeal.

Second point:
 Sufficiency of
 direction of
 order.

Secondly, whether the said order so directed and served as aforesaid, was, notwithstanding the objection made to it at the time of such service, a good, valid, and binding order or not.

Aghionby in support of the order of sessions.

First point:

I. The inhabitants of the township of Bishop Wearmouth had no right to appeal, since they were not the persons aggrieved by the order. By the 13 & 14. *Car. 2*, c. 12, s. 2, all persons who think themselves aggrieved by the judgment of the justices, may appeal to the quarter sessions. The 3 *W. & M.* c. 11, s. 10, enacts, that all persons aggrieved with the judgment of the justices may appeal to the quarter sessions. It is a *grievance*

by means of *the order* which these statutes contemplate. *Rex v. Hartfield* (a) is the only decision, and is not directly in point. The appellants in this case are not mentioned in the order. The inhabitants of the parish of Bishop Wearmouth, or of the township of Bishop Wearmouth Panns, might have appealed, but the inhabitants of the township of Bishop Wearmouth had no interest in the matter. They could not have been compelled to receive the pauper under the order; they cannot therefore be considered as aggrieved by the order. If the inhabitants of any parish are to be considered to have the right of appealing, who may "*think themselves aggrieved*," a very mischievous rule will be established. The township of Bishop Wearmouth was in the situation of a parish to which poor persons are brought without an order.

II. The order was valid, and was properly served upon the inhabitants of the township of Bishop Wearmouth Panns, and they were bound to receive the paupers, and if they were dissatisfied, should have appealed; *Spitalfields v. Bromley* (b), *Rex v. Kirby Stephen* (c). The pauper was settled in the township of Bishop Wearmouth Panns, but the magistrates, acting upon what they supposed to be the decision in *Spitalfields v. Bromley*, directed the order to the parish of Bishop Wearmouth, and gave the overseers directions to take the paupers to Bishop Wearmouth Panns. In *Rex v. Kirby Stephen*, the intention was to remove to the township of Kirby Stephen, and the order was directed to the parish, but served on the township, and it was held the township were bound by the order. It was intended in this case to remove to Bishop Wearmouth Panns, and the overseer of Bishop Wearmouth Panns was aware of the order. [Dezman, C. J. The township to which the removal was intended to be made has a different name from that of the parish.]


Armstrong, contra. The pauper was delivered to the


(a) Carth. 222.

2 Bott. P. L. 684, 5th edition.

(b) 18 Vin. Abr. 468; cited in

(c) Burr. S. C. 664; 1 Bott. 44.

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churchwarden of the parish of Bishop Wearmouth, who resided in the township of Bishop Wearmouth. The churchwarden is not an officer of either of the townships, but of the parish. By the service of the order upon the churchwarden, and the delivery of the paupers to him, and through him to the township of Bishop Wearmouth, a burthen was thrown upon the township, which gave them a right to appeal. The Court of Quarter Sessions ought to have quashed the order. [*Denman, C. J.* Did the appellants apply to have the order amended?] No such application was made. [*Taunton, J.* The sessions were wrong on two grounds; first, because the removing parish was not competent to object to the hearing of the appeal; and secondly, as the settlement was not in the township of Bishop Wearmouth, they were clearly wrong in confirming the order: if it were a mere mistake of parish for township, that would be clearly matter of form, which they might amend; here the word "Panns" is to be introduced, which is matter of substance.]


DENMAN, C. J.—Great pains have been taken to perplex this case, both by the justices and the removing township, for they all knew that Bishop Wearmouth Panns was liable to maintain the paupers, and yet acted as if they were ignorant of the fact. It may be easily ascertained how parishes are divided; and it was the duty of the removing parish, and should have been the care of the justices, to discover the names of the townships, and to remove the paupers to the place bound to maintain them. If they had done that here, there would have been no dispute. Instead of doing that, they think proper to remove to the parish of Bishop Wearmouth, which, for the purpose of maintaining the poor, has no existence at all. The next fact is, that the overseer of the removing township goes with the order and with the paupers to the officer of the township to which the removal ought to have been made, who objects to receive the paupers, unless the

former will consent to waive the 5*l.* costs. He did not consent, and the paupers were then taken to the churchwarden of the parish, who is no overseer of the township, and has no duty to perform, except to take care of the church. It must be taken as if the churchwarden were an entire stranger. It is not stated that the churchwarden received the order, but we must assume that he did. The churchwarden then takes the paupers with the order to the workhouse of the township of Bishop Wearmouth, where he lives. That township has them under the order for removing them to the parish of the same name. The question is, whether by volunteering to maintain to some extent, which they were not strictly bound to do, they come within the clause (sect. 2) of 13 & 14 *Car. 2*, c. 12, which gives the right to appeal, which enacts, "that all such persons *who think themselves aggrieved* by any such judgment of the said two justices, may appeal to the justices of the peace of the said county at their next quarter sessions, who are hereby required to do them justice, according to the merits of the cause." I do not think any one can be allowed to come in and appeal against an order upon any *capricious* view he may take; but I do think there was in this case, sufficient reason to doubt whether the township might not be prejudiced, to entitle them to come in and discuss the question before the Court of Quarter Sessions. The sessions thought that the inhabitants of the township had not the power of appealing; I think that they have, though, perhaps, there may be some doubt as to that question. The appeal was heard, and the order removing the paupers to the *parish* of Bishop Wearmouth was confirmed as proof of a settlement in the *township* of Bishop Wearmouth Panns, which, for this purpose, is to be considered as a third place. Clearly the sessions have done wrong, and the order of sessions must be set aside.

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LITTLEDALE, J.—It seems to me, that, under the statute *Car. 2*, the township of Bishop Wearmouth had a right to

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appeal. An order is directed to the parish of Bishop Wearmouth; but the person who serves it goes to the township of Bishop Wearmouth. The township had therefore very fair grounds for supposing, that unless they bestirred themselves, they might be charged with the maintenance of the paupers.

TAUNTON, J.—I altogether agree in this, that the order of sessions was, on the merits of the case, wrong; because on the statement it appears that the pauper was settled in Bishop Wearmouth Panns, and though he ought to be removed to that township, the sessions have confirmed an order which does not remove him to that township, but to the parish at large. It was intended to remove him to the township of Bishop Wearmouth *Panns*, so that there was not a mere verbal mistake in the order. I have very great doubts on the other question, whether or not enough appears to shew that the inhabitants of the township of Bishop Wearmouth had reasonable cause to think themselves aggrieved. The statute does not mean that any one, upon any inconsiderate thoughtless view of the case, may appeal, but persons who have *reason* to think themselves aggrieved. It is very questionable, I think, whether the township of Bishop Wearmouth had reason to think themselves aggrieved. There does not appear to me to have been a proper service, or, indeed, any service on any officer of the township of Bishop Wearmouth. The service is on the churchwarden, who is to be considered altogether as a stranger to the affairs of the township. The overseer of Bishop Wearmouth Panns refusing to take the pauper, the churchwarden of the whole parish was served. My doubt is, whether, as the order was never served on the officer of the township of Bishop Wearmouth, it can be the subject-matter of appeal by that township. If it cannot be the subject-matter of appeal, then every thing that was done at the sessions was *coram non judicibus*. If, however, the township had fair and reasonable grounds to apprehend they would be

affected by the order, it was competent to them to appeal against it.

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PATTERSON, J.—On the second point, supposing the matter could come before the sessions, I am quite clear the adjudication of the sessions is wrong. It is matter of regret that the justices should have mistaken the case of *Spitalfields v. Bromley* (a). The utmost extent to which *Spitalfields v. Bromley* can go is, that the justices are not bound to inquire of divisions into townships; but if it be actually brought to their knowledge that the pauper is settled in a particular township, I think that they are bound to remove to that township. The service on the township of Bishop Wearmouth Pannus was not a good service. The order was addressed to the officers of the parish at large; it was served, not on the officers of the township of the same name, (that might be good,) but on the officers of a township having a totally different name. One question is, whether there was a locus standi for the appellants. It does seem to me, that the overseers of the township of Bishop Wearmouth were merely volunteers. I do not see why the churchwarden did not take him to the other township of Bishop Wearmouth Pannus. The overseer of the township of Bishop Wearmouth did, however, receive and maintain the paupers, in consequence of the order, which they appear to have supposed might impose an obligation on them.

Order of Sessions quashed (b).

(a) 18 Viner's Abridgment, Laws, by Const, page 684, 5th ed. 468; and transcribed at length in (b) And see *Rex v. Bingley*, the second volume of Bott's Poor ante, ii. 103.

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The KING v. The Justices of the West Riding of YORK-
SHIRE.

The adjudication of the Court of Quarter Sessions, upon an appeal relating to an act done in pursuance of a local turnpike act, is final; and a mandamus does not lie to require that Court to rehear such appeal.

IN Michaelmas term last *F. Pollock* obtained a rule calling upon the Justices of the West Riding of Yorkshire to shew cause why a mandamus should not issue, commanding them to cause continuances to the next general quarter sessions of the peace for the said riding, to be entered upon the appeal of *John Briggs*, against a certificate under the hands and seals of two of the said justices, and at such sessions to hear and determine the merits of the said appeal.

An act of parliament was passed in 6 *Geo. 4*, for making and maintaining a new turnpike road from Leeds to Halifax, and several branch roads therefrom, all in the West Riding of the county of York. The preamble was as follows:—"Whereas the making and maintaining a new turnpike road from Leeds, in the parish of Leeds, in the West Riding of the county of York, to join the Wakefield and Halifax turnpike road at or near a certain place called Whitehall, in the township of Hipperholme-cum-Brighouse, in the parish of Halifax, in the said riding, passing through or into the several townships or places of Leeds, Holbeck, Wortley and Farnley &c., all within the riding aforesaid; and the making and maintaining several branch roads from and out of the said main turnpike road, one of the said branch roads commencing &c., will be a great advantage and accommodation to the inhabitants of the towns of Leeds and Halifax, and of the several townships and places lying near the said roads, and to the public in general."

A section of the act contained the following proviso:—"That the said new roads shall not be *respectively* opened to the public, or become public highways, until two justices of the peace acting for the West Riding of the county of York, legally assembled at a special sessions, shall have certified that the said roads *respectively*, and the bridges,

culverts and embankments, and other works thereon respectively, are completely made and fit to be travelled upon throughout the whole length of such roads respectively."

Two justices of the West Riding certified under their hands and seals, that they had viewed so much of the main turnpike road, authorized to be made by 6 Geo. 4, as is situate within the wapentake of Agbrigg and Morley, and lies between Whitehall and the centre of the river Aire, in the township of Holbeck, in the said riding, and that such part of the said main road, and the bridges, culverts, embankments and other works thereon, were completely made and fit to be travelled upon throughout the whole length of such road. Two justices of the borough of Leeds certified that the remaining portion of the road, which was situate within the borough, was complete.

By the General Turnpike Act^(a) it is enacted, that if any person shall think himself aggrieved by any determination, matter, or thing, done by any justices of the peace in pursuance of that act, or any local act for making or repairing any turnpike road, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace for the riding, &c. wherein the cause of complaint shall arise, and the said justices at such sessions shall hear and finally determine the causes and matters of such appeal; that the determination of such general or quarter sessions shall be final and conclusive to all intents and purposes; and that no proceeding to be had or taken in pursuance of that act, shall be removed by certiorari or other process into any Court of record at Westminster.

At the Michaelmas West Riding sessions an appeal was entered by *Briggs*, who was a rated inhabitant of Wike, against the certificates above mentioned.

On the hearing of this appeal, the counsel for the appellant objected in limine that the certificate was premature, and therefore void, because all the branch roads authorized to be made by the act were not completed; and the court,

(a) 4 Geo. 4, cap. 95, sect. 87.

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after hearing argument upon the point, and without going further into the merits of the appeal, decided that the certificate having been given before the branches of the said roads were completed, was therefore void.

Before such adjudication was made, the counsel for the respondents tendered evidence in support of the certificate, which the Court refused to hear.

Sir *G. Lewin* and *Baines* now shewed cause. By the General Turnpike Act (*a*), any person thinking himself aggrieved by any matter done by any justice of the peace in pursuance of any local turnpike act, may appeal to the quarter sessions of the peace, and no proceeding is to be removed by certiorari. The intention of the legislature was, that the adjudication of the sessions should be final, and for that reason this Court cannot grant this application. Besides, the writ of mandamus is a remedial writ and the applicants should therefore have shewn that they were aggrieved. In *Rex v. Cumberworth* (*b*), it is clearly laid down that where an act directs several roads to be made, the completion of *all* the roads is a condition precedent to the taking of any toll from the public, or to the burthening of the public with the repair of any part of the roads. From the language of the preamble (*c*), and the whole of the local act, it is evident that the legislature intended that the whole of the roads should be completed before any portion of them should be opened. Until the whole of the roads are finished, it is impossible to say that the public have received the benefit the legislature intended for them.

The object of the parties is to review the decision of the Court of Quarter Sessions. The sessions have entertained the appeal, and have decided in favour of the appellants. If all the evidence which can be imagined had been produced to shew the roads made were in a complete state, the

(*a*) *Ante*, 87.

(*c*) *Ante*, 86.

(*b*) 3 Barn. & Adol. 108.

sessions might have adjudicated that the certificate was premature. If this case be sent down again, the result will probably be the same, unless the Court upon the present occasion pronounce an extra-judicial opinion. This is not a Court of Error from the Court of Quarter Sessions. In *Rex v. Justices of Curwarren* (a), it was expressly determined that this Court has no jurisdiction to review the judgment of the quarter sessions, except on a case sent up for their consideration. *Bayley, J.* in that case says, "There is no instance, I believe, which can be found where the Court interfered by mandamus to direct the justices to rehear an appeal which they have once already heard. In this case they entered into the consideration of the appeal, and after having heard it they have decided that the respondents ought not to be allowed to call witnesses in reply. It is possible that in that decision they may have been wrong, but it seems to me that we are not at liberty to enter into that question, as no case has been sent up for our consideration."

It is said that the Court refused prematurely to hear evidence. Some evidence that the roads were unfinished must have been given, or that fact must have been admitted, as otherwise the objection, that the certificate was premature, could not have been raised.

F. Pollock, Milner, and Dundas, contra. First, as to the merits of the appeal. By the local act certain trustees are authorized to make a road from Whitehall to Leeds, and branches from the main road in various directions. When a certificate is given by two justices that the main road is in repair, it is to be thrown open to the public. It is contended on the other side, that because the various branches of the road are not finished, therefore the public are not to have the benefit of the main road. This is evidently an erroneous construction of the local act. The object of making the road was to connect Leeds with Halifax, and that object has been attained. The clause in question (b) pro-

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(a) 4 Barn. & Ald. 86.

(b) *Ante*, 87.

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vides that the said new roads *respectively* shall not be opened unless two justices shall have certified that such roads *respectively* are in a complete state. In *Rex v. Cumberworth* there was but one road and one set of termini, and there was no question as to the branches of the road. The whole case turned upon the argument that the making the *whole main* road was a condition precedent. [*Taunton, J.* In *Rex v. Cumberworth* the main road was not finished, and that relieved the Court from the necessity of considering what effect the non-completion of the branches would have.] Then as to the issuing of the mandamus to hear the merits of the appeal. If the sessions have mistaken the law, and refused to hear the evidence, this is the proper tribunal for redress. The adjudication of the sessions is, that the certificate is void. It is said that if the sessions had heard the evidence, the respondents would have had no redress, but it does not follow that they are now to have none. It may be that the sessions have declined to hear the evidence, in order that by means of an application for a mandamus the opinion of this Court upon the construction of the act may be obtained. The sessions should have paused, and should not have decided without hearing evidence. Judges have sometimes found reason to change their opinion as to the application of general principles upon hearing the particular facts. The sessions ought to be discouraged from deciding general points of law without hearing evidence, and ought to be required to hear the evidence in order that they may see whether, in good sense, the general principle of law applies to the particular facts. Unless this application be granted there is no remedy. A case cannot be brought up, as the certiorari is taken away. If an arbitrator sets out the facts of the case in his award, and it appears that he has mistaken the law, this Court will set aside the award. The Court has all the facts before it in this case, and the Court of Quarter Sessions has clearly mistaken the law. If the certificate is *void*, as the sessions have determined, it ought not to have been appealed against, and the adjudication of the sessions could not make it either better or worse.

DENMAN, C. J.—One of the arguments urged at the bar is, that the decision of the Court of Quarter Sessions will have no effect, and that it will not interfere with the rights of parties. If that be so, our interference is not necessary. But supposing that the decision of the sessions in this case does affect the rights of parties, I am of opinion that this Court has no authority whatever to interfere with that decision, because the General Turnpike Act gives them not only the power to adjudicate upon the question in dispute, but takes away the writ of certiorari. If we were to say, by issuing this mandamus, that we could revise the proceedings of the Court of Quarter Sessions, even when the magistrates desired it, we should repeal the 87th section of the General Turnpike Act, and give the magistrates an opportunity of shrinking from their duty. Whether the sessions have done right or wrong, this Court cannot now interfere. The Court of Quarter Sessions were perfectly right in confining their attention to the point of law, and not going into the evidence, because possibly it might change their general view of the question. I think we are bound to say that the Court of Quarter Sessions have done conclusively what they have done, and that this Court will not do that indirectly which it cannot do directly.

LITTLEDALE, J.—If we were to make this rule absolute it would enable the parties to avoid the 87th clause in the General Turnpike Act. No doubt the object of the parties was to get the opinion of this Court upon the question. The preamble of the local act states, that the making and maintaining a new turnpike road from Leeds to join the Wakefield and Halifax turnpike road at a place called Whitehall, and the making and maintaining several branch roads from and out of the said main turnpike road, will be a great advantage and accommodation to the towns of Leeds and Halifax, and of the several townships and places lying near the said roads, and to the public in general. It is then enacted, that after the expiration of one month next after

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the passing of the act, a statute of 46 Geo. 3. shall be repealed, and the act shall from thenceforth commence, during the term thereafter mentioned, for the purpose of making and maintaining, widening and improving the several roads thereafter mentioned. The main road and the various branches are then described. Then there is a section which provides that the said new roads shall not be *respectively* opened to the public until two justices shall have certified that the said roads *respectively* are completely made, and fit to be travelled upon throughout the whole length of such roads *respectively*. The word "respectively" occurs three times, and the preamble treats the main road and the branches as distinct roads. There is no doubt, therefore, upon my mind that this case is distinguishable from *Rex v. Cumberworth*, and that the certificate was not premature.

TAUNTON, J.—On the point just mentioned it does not seem to me to be necessary to decide. If, however, I were pressed to give my opinion, it would accord with that expressed by my brother *Littledale*. The question is, whether we have jurisdiction to interfere with the decision which has been given by the Court of Quarter Sessions. The question before the Court of Quarter Sessions was, whether the certificate was made in due time, or was premature. It is admitted by the gentlemen who have argued to-day, that this was one of the *merits* of the appeal. I apprehend that when the legislature, by the General Turnpike Act, took away the writ of certiorari, they intended to take away our power of interfering with the decision of the Court of Quarter Sessions, and to make that a court without appeal. If, therefore, we made this rule absolute, we should be indirectly repealing the 87th section of the General Turnpike Act. The statute has made the Court of Quarter Sessions supreme judges in matters of this sort, and we should be deciding that they were not.

PATTESON, J.—It is not denied that there was an ap-

peal from the certificate of the two justices to the Court of Quarter Sessions; and consequently that court had jurisdiction over this matter. Two questions were to be determined at the sessions; first, whether the certificate was valid in point of law; and secondly, whether it was justified in point of fact. If the first question was decided in favour of the appellants, I cannot see what reason there was for entering upon the second. It became wholly immaterial. It was said that if the Court of Quarter Sessions had heard the facts, they possibly might have changed their opinion. It is, however, no ground for granting a mandamus that the Court has refused to listen to useless and irrelevant matter. The Court of Quarter Sessions had jurisdiction. They have determined the matter; and if so, we have no power to send the case back to them.

I do not say what my opinion would have been upon the certificate if I had been a member of the Court of Quarter Sessions, because I will not encourage parties to speculate upon procuring the opinion of this Court. I think it right to discourage applications made with that view.

Rule discharged.

The KING v. The Justices of the East Riding of YORKSHIRE.

IN Michaelmas term, 1833, *Cresswell* obtained from *Littledale, J.* in the Bail Court, a rule nisi for a certiorari to remove an order of the East Riding Yorkshire Sessions (for the purpose of moving that it might be quashed) upon an affidavit which stated the following circumstances :

By an order of two justices, *Peter Grantham* and *Eli- zabet* his wife were removed from Cottingham to Weel, both in the East Riding of Yorkshire. An appeal

remove the proceedings for the purpose of quashing the order of sessions will not be granted, although the respondents received no notice of trial, as required by a rule of court of the sessions, and were consequently wholly unprepared for the trial.

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Where an ap-
peal against an
order of re-
moval has
been tried
with the ac-
quiescence of
the appellants
and the re-
spondents, and
the order
quashed, a
certiorari to

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against this order of removal was entered by Weel at the East Riding sessions, held at Beverley, on the 8th day of April, 1833, and respited.

The Court of Quarter Sessions have established the following rule: "In all appeals against orders of removal of poor persons, the service of the notice of appeal may be proved by any one of the appellants, and upon the hearing of such appeals the appellants shall produce the pauper, or, if more than one, the head of such family shall be removed, in order that such pauper may be examined by the removeants, if they shall think proper."

At the general quarter sessions in July the appellants did not produce the pauper *Peter Grantham*, and at their instance the appeal was respited until the following sessions. By another rule of the Court of Quarter Sessions it is ordered, that "In all cases of appeal not otherwise directed by law, eight days notice of trial in writing shall be given by the party appealing, his, her, or their attorney or solicitor, inclusive of the day of service, and the first day of the sessions at which the appeal is intended to be tried." No notice of trial was given by the appellants. The respondents did not therefore at the following sessions make any preparation for trial of the appeal. At these sessions the respondents moved that the appeal should be dismissed, on the ground that no notice of trial had been given. The Court of Quarter Sessions refused to dismiss the appeal, compelled the respondents to proceed to trial, and, after hearing the evidence, quashed the order of removal, and also gave the appellants costs, including the expenses incurred at the July sessions. The pauper, *Peter Grantham*, was on this occasion produced by the appellants.

Cresswell obtained a rule nisi for quashing this order of sessions on two grounds: 1st. That the Court ought not to have tried the appeal, but should have dismissed it. 2ndly, That the Court of Quarter Sessions had no authority to give the expenses at the July sessions.

F. Pollock and *Archbold* were about to shew cause, when

the Court called upon the counsel for the respondents to state on what grounds the rule nisi was granted.

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Cresswell and *Wrangham*, in support of the rule. The ground on which the rule was granted was, that the appeal was heard when no notice of trial had been given. The appeal came on at a former sessions, and was respited. The rule of the Court of Quarter Sessions requires eight days' notice of trial. [*Denman*, C.J. The justices have decided that that rule does not apply to a respited appeal. Is there any example of the judgment of the Court of Quarter Sessions being set aside, after the case, with the acquiescence of the parties, has been fully heard?] In *Rex v. The Justices of Lindsey(a)*, the respondents gave notice, that at the sessions subsequent to the order they would enter and try the appeal. At those sessions the appeal was respited until the following sessions, at the instance of the respondents. At the following sessions the respondents objected to the hearing of the appeal, on the ground that the appellants had not given any notice of their intention to prosecute and try the appeal, pursuant to a rule of the Court of Quarter Sessions. The justices decided, as it is contended they ought to have done in this case, that the appeal could not be heard. The Court of King's Bench, upon the application of the appellants, granted a mandamus to compel the justices to receive the appeal, but the ground of the decision was, that the appeal had been respited at the instance of the respondents. Lord *Ellenborough* says, "The appeal was adjourned at the instance of the respondents, who now require notice: but have they not in effect had notice? The object of giving notice is to inform a person of that of which he may otherwise remain ignorant; but a person cannot be supposed to be ignorant of that which is done at his own request, and for his own convenience. [*Taunton*, J. In that case the application was to hear the appeal.] It is submitted that this appeal was not properly heard. [*Denman*, C. J. You acquiesced in the trial.]

(a) 6 Maule & Selw. 379.

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DENMAN, C. J.—We think that this is a fatal objection. Where the chance of the favourable termination of a trial has been taken by a party, it is not for him to come here when he has been unsuccessful, and require us to set that trial aside. Suppose a cause tried at the assizes, and no notice of trial had been given, could the party who had appeared and taken his chance of a verdict ask for a new trial on that ground? With respect to the costs, the Court of Quarter Sessions have no power to award costs, except such as are incurred at the sessions at which the appeal is tried.

F. Pollock applied for the costs of the motion; and, in answer to a question by the Court, stated that he appeared for the magistrates.

Rule discharged with costs.

BROOKER v. WOOD.

The carrying on by *A.* of the business of retailing beer in a public-house in the name and by the agency of *B.*, the person licensed by the magistrates, is not a fraud on the licensing system.

A sale to *A.* therefore, for the purposes of such trade, is valid.

DEBT for goods sold and delivered. Plea: nil debet. At the trial before Lord *Lyndhurst*, C.B. at the Sussex Lent assizes, in 1833, it appeared that the action was brought to recover 46*l.* 7*s.* 10*d.* for beer supplied in 1830, 1831, and 1832, to the defendant, who was an excise officer, and carried on business as an inn-keeper, at the Star, in Blatchington. The business was conducted by his daughter, who alone resided there; and the licence from the magistrates to sell beer was in her name. The defence was, that the daughter was liable, and that credit was not given to the defendant; and it was objected on his part, that assuming that credit was given to him, the plaintiff could not recover, as the contract would be a fraud on the law; *Meur v. Humphries* (a). The Lord Chief Baron left the question to the jury, whether credit was given to the defendant. They found that credit was given to him. Upon which the

(a) *Moody & Malk.* 133; 3 *Car. & Payne*, 79.

Lord Chief Baron directed the plaintiff to be nonsuited, but gave him leave to move to set aside the nonsuit, and to enter a verdict. In Easter term last, *Andrews*, Serjt., obtained a rule nisi accordingly; against which

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Platt now shewed cause. The carrying on the trade by the defendant was a fraud on the excise, and the contract was therefore void. *Meux v. Humphries* is an express authority for that position. The beer in that case was supplied upon the credit of the defendant, but the licence had been granted to his niece; and there Lord *Tenterden*, C. J. thus expresses himself: "I am clearly of opinion that the brewers cannot charge any one as their debtor, in the first instance, except the person who is licensed to keep the house, because it is a fraud on the excise. The brewer may hold any person, who is not licensed, liable as a collateral security, but not as the primary debtor."

W. H. Watson, contra. This question arises on the 18th section of 9 Geo. 4, c. 61 (a), which enacts, "That every person who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, any excisable liquor by retail, to be drunk or consumed in his house or premises, or shall permit or suffer any excisable liquor to be sold, bartered, exchanged, or otherwise disposed of for valuable consideration, by retail, to be drunk or consumed in his house or premises, without being duly licensed so to do; and that every person being duly licensed who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, or shall permit or suffer to be sold, bartered, exchanged, or otherwise disposed of for valuable consideration, any excisable liquor by retail, to be drunk or consumed in his house or premises, not being the house or premises specified in such licence, shall respectively for every such offence, on conviction before one justice, forfeit and pay any sum not exceeding 20*l.*, nor less than 5*l.*, together with the costs of the conviction."

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When *Meur v. Humphries* was decided, this act was not in force, but the 35 Geo. 3, c. 113, and the 4 Jac. 1, c. 1. By sect. 1 of the latter act it was enacted, "That no person or persons, by himself, or by any other ways or means, directly or indirectly, shall sell, utter or deliver, or cause to be sold, uttered or delivered, any beer or ale to any person or persons, or into the house or cellar of any person or persons, that there shall sell or utter beer or ale as a common tipler or alehouse-keeper, the same person not having any licence then in force to sell ale or beer, other than for the convenient use and expense of his, her, or their household only." The selling of ale or beer to a person not licensed, to be consumed in an alehouse, was therefore then *prohibited*. But by the 9th Geo. 4, a *penalty merely* is imposed on the person carrying on the trade of an alehouse-keeper in the name of another. This is merely an excise regulation. In *Brown v. Duncan*(a) the principle is established, that a contract which is merely a breach of an excise regulation is not void. So in *Hodgson v. Temple*(b), and *Johnson v. Hudson*(c). [*Littledale, J.* Some doubt may be entertained of the authority of the last case.] *Wetherall v. Jones*(d) is to the same effect; and a recent case in the Exchequer, not yet reported. There is nothing unusual or contrary to public policy in carrying on the trade in the way done in this case. The power to license was given to the magistrates that they might select a proper person to carry on the trade. They have licensed the daughter in this case. They may, if they think proper, license one person as a trustee for another. There was no fraud upon the magistrates, since the business is carried on by the person to whom they granted a licence, although the capital is provided by another person. There has been in truth nothing more than the breach of a revenue regulation.

DENMAN, C. J.—The view taken by Lord *Tenterden* is

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| (a) 5 Mann. & Ryl. 114; 10 | (c) 11 East, 180. |
| Barn. & Cressw. 93. | (d) 3 Barn. & Adol. 221. |
| (b) 5 Taunt. 181. | |

entitled to great weight. In a case (a) now pending before this Court, in which we shall give judgment shortly, a similar question has arisen. We had better, therefore, give the case a little more consideration.

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Cur. adv. vult.

DENMAN, C. J., on a subsequent day in this term, delivered the judgment of the Court. After stating shortly the circumstances of the case, his lordship proceeded:—In *Meux v. Humphries*, Lord Tenterden thought that the brewers could not charge any one as their debtor in the first instance, except the person who was licensed to keep the public-house; but upon considering this question very fully, we are of opinion that this is not so. We think this cannot be considered a fraud on the licensing system, because it is the duty of the magistrates to select some person to carry on the business over whom they may have a proper control. The magistrates did select the party conducting the business in this instance, and the object of the legislature was consequently attained. We think the circumstances of another person buying beer for the party licensed, and receiving the profits of the business, do not constitute a fraud on the law. The nonsuit must therefore be set aside, and there must be a rule absolute to enter a verdict for the plaintiff.

Rule absolute.

(a) *Foster v. Taylor*, post.

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The KING v. The Inhabitants of ST. CUTHBERT, Wells.

A. by indenture executed by himself and the parish officers, is bound apprentice in husbandry to *B.* in respect of an estate rented by *B.* of *C.* *A.* never serves *B.*, (who is not shewn to be consuant of the binding,) but is taken by the overseers to *C.*, and serves him in his trade of a stocking-maker. *A.* gains no settlement by the service, either as under an original binding to *C.*, or as under an assignment from *B.* to *C.* The Court of Quarter Sessions in a case sent by them for the opinion of the Court of K. B., should state the conclusion of fact which they draw from the evidence, and not the evidence itself.

ON appeal against an order by which *J. Ivey* was removed from St. Simon and St. Jude, in the city and county of Norwich, to St. Cuthbert, in the city of Wells, in the county of Somerset, the sessions confirmed the order, subject to the opinion of this Court upon a case to the following effect.

The city of Norwich contains the parishes of All Saints and of St. Simon and St. Jude, thirty-two other parishes, and eight hamlets.

By an act of 10 *Anne*, "for erecting a Workhouse in the City and County of the City of Norwich, for the better employing and maintaining the Poor there:" certain guardians, of whom some were official and others eligible, were incorporated by the name of "The Governor, Assistants, and Guardians of the Poor of the City of Norwich, and County of the said City," and were to ascertain what sum was necessary for the maintenance of the poor, and what proportion each parish should raise and pay by separate rates in each parish, in proportion to rental and stock, without reference to the number of paupers receiving relief.

By an act of 7 *Geo.* 4, appeals against any order of removal from any parish or hamlet of the city may be made by giving eight days notice to the governor, deputy governor, or clerk, for the time being, of the corporation.


Removals from foreign parishes are made to particular parishes in Norwich; and instances have occurred of successive removals of the same pauper, to the same foreign parish, from different parishes in Norwich. By an act of 2 *Will.* 4, repealing all the former acts, the powers contained in those acts are vested in the same corporation of guardians, and the same notice of appeal is required to be given.

In February, 1829, upon an order of removal dated October, 1828, and which had been suspended, the pauper was removed from All Saints, Norwich, to St. Cuthbert, Wells. Upon that order being appealed against it was quashed.

On the 1st of November, 1831, the pauper, then residing in St. Simon and St. Jude, having been relieved by the guardians, was again removed by an order of justices to St. Cuthbert, Wells; which order was the subject of the present appeal. At the trial of the appeal the respondents sought to establish a settlement of the pauper in the appellant parish as derived from his father, *J. Ivey*, who had been placed out as an apprentice by the officers of Ditcheat. They proved the loss of the original indenture, and then gave in evidence a counterpart produced from the parish chest of Ditcheat; and it was admitted that the original was signed by the pauper and the parish officers. By this indenture, dated 1770, the parish officers put *John Ivey* apprentice to *Edward Powell*, for and in respect of *William Wilmot his estate*, and *Powell* covenanted to teach *Ivey* the art and business of husbandry. The respondents further proved that *Powell* was tenant of a farm at Ditcheat, the property of *Wilmot*, who was a stocking maker, residing at Wraxhall, in Ditcheat, but who afterwards lived in the appellant parish, where the pauper's father lived with him and was employed as a stocking-weaver. *John Ivey* the father, at the time he was bound out, was living with his sister, *Mrs. Ward*, in Ditcheat. It was not proved that her brother went to *Powell's*, and his sister said that she knew nothing about *Powell*. Under the directions of the parish officers of Ditcheat, she took her brother to *Wilmot's*. She kept her brother for a quarter of a year, *Wilmot* not being ready to receive him, *Wilmot* paying her for his board. Afterwards *Wilmot* sent for him, and the boy went and lived with him, first at Wraxhall, and then in the appellant parish. He remained in the latter a sufficient length of time to give him a settlement by apprenticeship, if such settlement could be acquired by service under the indenture.

The questions for the opinion of the Court are—
1st. Whether the order of sessions made upon the appeal against the order of magistrates, removing the pauper from the parish of All Saints, in Norwich, to the appellant

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parish, was final and conclusive as to the settlement of the pauper in any removal from any other parish or hamlet in the said city, as well as from the parish of All Saints. *Adly—* Whether any settlement was gained by the pauper's father in the appellant parish, by his service with Mr. *Wilmot*.

First question:
 Whether Nor-
 wich an entire
 district as to
 settlements.

Austin, in support of the order of sessions. The first question is, whether the city of Norwich is, for the purposes of gaining a settlement, one parish, or thirty-four. That for this purpose the parishes continue separate and distinct, has been decided in the case of *Rex v. St. Michael's at Thorn, Norwich(a)*. [*Denman*, C. J. We had better hear Mr. *Andrews* upon that point.]

Second ques-
 tion:
 Sufficiency of
 service.

The second question is, whether by his service with *Wilmot*, the pauper's father gained a settlement in the appellant parish. The party was bound an apprentice to *Powell*, for and in respect of *Wilmot's* estate. He never entered the service of *Powell*, nor was it intended that he should do so, but went immediately to *Wilmot*, whom he served as an apprentice. *Holy Trinity* and *Shoreditch(b)* appear to be this case, almost in the same words, and there it was held, that the facts were tantamount to an assignment. So in *All-hallows on the Wall v. St. Olave, in Surrey(c)*, which was decided upon the authority of the last case. It will be found very difficult to distinguish this case from the ordinary case of an assignment of an apprentice. In *Rex v. Whitechurch(d)*, the Court considered that there must be a consent of the first master, with the knowledge of the second, that the party was an apprentice, and that the service must be in the character of an apprentice. Here, all these requisites are complied with. With respect to the consent of the first master, it must in this case, after a period of sixty years has elapsed, be presumed that *Powell* consented, and the knowledge of the second master that

(a) 6 T. R. 536.

(b) 1 Stra. 10.

(c) *Ibid.*, 554.

(d) 2 Dowl. & RyL. 845; 1 Barn. & Cress. 574.

the party was an apprentice, is clearly shewn by the facts. The party also, it is clear, must have known that he was serving in the character of an apprentice. The only purpose for which the consent of the first master, and the knowledge of the second, is required, is, that the party may serve in the character of an apprentice. It is clear that an assignment of an apprentice may be by parol, *Rex v. St. Olave*, and it is also clear that the assignment may be to learn a different trade from that of the original master, *Rex v. Louth(a)*. [Denman, C. J. The facts are stated, but should not the sessions draw the inference, if the circumstances warrant it?] The Court have said in one or two cases that they would draw an inference warranted by the facts. [Littledale, J. They certainly have said so in one or two cases, but I should be sorry to see that become a general rule.]

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Biggs Andrews, contra: Upon the facts, as found by the case, there was no binding to *Wilmot*, and the presumption of an assent by *Powell*, to the apprentice serving *Wilmot*, is negatived. There was here no assigning to *Wilmot*, nor was *Wilmot* an original party; for where it is said that the apprentice was bound in respect of Mr. *Wilmot's* estate, nothing more was intended than a mere description of *Powell's* occupation. This therefore distinguishes the case from those which have been cited. The binding was of a parish apprentice, and it was necessary that the justices should assent to the binding. They did assent to the binding to *Powell*, and it is quite clear that under this binding the apprentice could not be compelled to go to *Wilmot* to learn the trade of a stocking-weaver, instead of learning that of a husbandman with *Powell*. [Denman, C. J. There is no master bound by this indenture. The person called by this indenture the master, does not appear to have signed. If *Powell* had taken the apprentice into his service this might have dispensed with the signing. But here the respondents rely on an assignment by

(a) 2 Mann. & Ry. 273; 5 Barn. & Cressw. 247.

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Powell to *Wilmot*, when it is not found by the sessions that *Powell* had any connection with the deed. *Patteson*, J. I cannot find anything in this case to shew that *Powell* had anything to do with the transaction.] On the contrary, it is found that the boy was taken in the first instance to *Wilmot*. It is clear that there was no consent.

Palmer, on the same side, was not called upon by the Court.

DENMAN, C. J.—There ought to be a positive finding of every essential fact. That not having been done here, we cannot presume anything. The assignment and consent ought to have been stated.

LITLEDALE, J.—The sessions are the proper judges, and ought to draw the conclusion. There is no reason at all to suppose that *Powell* knew anything about the matter.

TAUNTON, J.—There is neither a sufficient binding, nor a sufficient assignment. I am at a loss to know whether *Powell* or *Wilmot* was the master.

PATTESON, J. concurred.


Order of Sessions quashed.

THE KING v. THE INHABITANTS OF CHIPPING SODBURY.

Held: that a judge's order or fiat for a certiorari to issue in vacation can only be granted nisi.

BY an order of justices, *Martha Williamson* (wife of *Joseph Williamson*), and her five children, viz. *George*, aged nine years; *Samuel*, aged seven years; *Hannah*, four; *Thomas*, three; *Emma*, two; were removed from Chipping Sodbury, in the county of Gloucester, to North Nibley, in the same county. This order was appealed against at the Gloucester Michaelmas sessions, 1832, and after the merits

of the case had been heard, the counsel for the appellants objected; first, that there was no adjudication that the two eldest children had not gained settlements in their own right; secondly, that the adjudication should have been that the settlement of the husband was in North Nibley, and not, as was stated in the order, that the settlement of the wife and children was there; thirdly, that the children were removed as the children of the wife, and not as the children of the husband. Upon these objections the Court of Quarter Sessions quashed the order as defective in form, and not upon the merits, and the order of the Court of Quarter Sessions expressly so stated. A certiorari was sued out in Trinity vacation, 1833, under the fiat of the Lord Chief Justice, upon an affidavit of the above facts. The order of removal and the order of sessions having been returned with the certiorari, in Michaelmas term, *Greaves*, upon a statement in Court of the above facts, and referring to several cases (a), obtained a rule nisi to quash the order of sessions, on the ground that it quashed, for defect of form, an order that was perfectly good on the face of it.

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W. J. Alexander was about to shew cause, when the Lord Chief Justice inquired whether there had been a rule to shew cause why the certiorari should not issue. It was stated at the bar, that the certiorari had been obtained on the fiat of the Lord Chief Justice in vacation in the first instance.

Greaves, in support of the rule, stated that the invariable practice had been, that if a certiorari be applied for in vacation; where no case is stated by the sessions, it is granted on the fiat of a judge, and issues immediately; but if it be applied for in term time, a motion is always made in open Court, for a rule to shew cause why the certiorari should not issue; and that where a case has been stated, the rule nisi for the certiorari is obtained on counsel's

(a) *Rex v. Higher Walton*, Burr. S.C. 163; *Rex v. Ryton*, Cald. 39, &c.

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signature only. He stated further, that in this case the practice had been inquired into at the Crown office, and the certiorari applied for and issued in pursuance of the information there obtained.

DENMAN, C. J.—The rule for the certiorari cannot be granted out of term absolutely in the first instance. The rule to quash the order of sessions must be discharged.

Rule discharged (a).

(a) As to the practice of issuing a certiorari in vacation, without a rule to shew cause, upon a judge's fiat, see 1 Gode, 116; 2 Nol. P.L. 589. In *Rex v. Newton*, Barr. S.C. 157, *Chapple*, J. granted his fiat for a certiorari to remove an order of sessions, but refused to grant it in respect of the original order. Afterwards the Court said,

"Here was a regular application to a judge within time, and with due notice as to the order of sessions, and he has granted a fiat for a certiorari to return it." Both orders were quashed. And see *Regina v. White*, 1 Salk. 150; *S. C.* Holt, 132; 5 & 6 W. & M. c. 11, s. 4.

The KING v. PATRICK GRANT and others.

Where evidence is rejected which is tendered for one purpose, and it is inadmissible for that purpose, but is admissible in another view of the case not alluded to at the trial; the Court will not grant a new trial as upon an improper rejection of evidence.

An affidavit to contradict the statement of a judge as to what occurred

THIS was a criminal information for a libel in a Sunday newspaper called *The True Sun*. The information stated, that before the committing of the offences thereafter mentioned in the first two counts, a commission of bankruptcy had issued against the defendant *Grant*, under which he had been declared a bankrupt, and that one *H. W.*, one of the aldermen of London, was duly appointed one of the assignees under such commission, and *T. B.*, an attorney of the Court of K. B., had acted as the solicitor under the said commission; and that before the issuing of the said commission, *Grant* had been and was a proprietor with *M. Y.*, of a certain newspaper called *The Sun*; and that certain transactions had taken place since the said bankruptcy respecting the sale by the assignees of *Grant* of his

at the trial before him, is inadmissible:

interest in the said newspaper. The information then went on to state, that the defendants composed, printed, and published a defamatory libel concerning H. W. and T. B., with reference to their conduct in these transactions. To this information the defendants pleaded not guilty. At the trial before Denman, C. J., and a special jury of the county of Middlesex, witnesses were called to prove the statements contained in the information, respecting the transaction under the commission. These witnesses the counsel for the defendants attempted to cross-examine relative to the circumstances attending those transactions. The Lord Chief Justice was of opinion that this could not be done, as it was, in fact, an attempt to give evidence of the truth of the libel, and therefore he refused to allow the counsel for the defendants to go into this matter. The defendants were found guilty.

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and others.

F. Kelly now moved for a rule nisi for a new trial. The evidence was improperly rejected. The averments in the information authorized the defendants to give in evidence the particulars of the transaction. It is admitted that the truth of a libel cannot be given in evidence to prove the innocence of the defendants; but here it was impossible for the jury to determine whether it was the libel of and concerning these transactions, unless the particulars of the transactions were given in evidence. There is an allegation in the information that certain transactions took place respecting the sale of the newspaper. The libel is averred to be published of that transaction amongst others. It was impossible for the jury to judge whether the libel related to the sale, unless the particulars of the sale were before them. In *Re v. Horne*(a), where the libel was alleged to be written of and concerning his Majesty's government, and the employment of his troops, an affidavit was allowed to be read to explain the subject-matter of the libel. The evidence in this case was tendered with a view of explain-

(a) Comp. Reps 676.

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ing the subject-matter of the libel; namely, the transactions alluded to in the introductory averments. In *Rex v. Horne* Lord *Mansfield* uses these emphatic words:—"The gist of every charge of every libel, consists in the person of, or matter of, or concerning whom or which, the words are averred to be said or written." The gist of this libel consisted of the transactions, into evidence of which it was desired to go. The jury are to decide on the whole issue.

DENMAN, C. J.—It was undoubtedly put in issue whether the libel related to the transactions stated in the introductory part of the information. If the evidence had been offered with a view to inform the jury of the nature of the transactions, from which they might judge whether the libel related to those transactions, I should have admitted it. But it was taken for granted, at the trial, that the alleged transactions had taken place and had reference to the libel, and the object of the proposed examination was to convince the jury of the truth of the libel. With that view this evidence was tendered. That brought it to the question whether the truth was put in issue. On the ground that the truth was not put in issue the evidence was rejected, it not being suggested that it was wished to go into the evidence for the purpose stated to-day. A judge has a right to know the purpose for which the evidence is tendered. If it had been offered with the view stated to-day, it would have been admissible.

LITLEDALE, J., TAUNTON, J., and PATTESON, J., concurred.

On a subsequent day in the course of the term, the defendants were brought up for judgment. *F. Kelly* again moved for a new trial, and stated, that as he understood the decision of the Court to have proceeded on the ground that the evidence had not been offered with a view to inform the jury of the nature of the transactions, from which they might judge whether the libel related to those transac-

tions, he was furnished with the affidavits of two persons, and also with the notes of a short-hand writer, to shew that he had tendered it with that view at the trial; and as the judgment of the Court had proceeded upon a misapprehension of fact, he hoped the defendants would not now be precluded from taking the objection.

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DENMAN, C. J.—I have a distinct recollection and a note of what passed at the trial, and I cannot allow my statement to be contradicted. It was quite plain to me at the trial, that the intention was to enter into a general inquiry of the truth of the charges,—an inquiry which the law does not allow. The affidavits cannot be read—unless indeed, the rest of the Court entertain a different opinion.

LITLEDALE, J. and TAUNTON, J. concurred.

HUNT v. MASSEY.

ASSUMPSIT on a bill of exchange, dated the 1st of February, 1832, with the common money counts. Plea: non-assumpsit. At the trial at the sittings after last Michaelmas term, before *Denman*, C. J., it appeared that the plaintiff lent the defendant, when under age, 101*l.*, for which he drew a bill on the defendant, who accepted it when under age. The defendant became of age 19th June, 1832, and the bill fell due on the 4th of July, 1832. The plaintiff produced a letter in the handwriting of the defendant, which was dated on the 22d June, 1832, addressed to a third person, requesting him to pay the plaintiff 101*l.* out of a sum left to the defendant by his grandfather. It was objected to on the part of the defendant that the declaration did not contain any special count founded on the promise to pay made after the defendant became of age. The jury found a verdict for the plaintiff; but the Lord

A., during his minority, accepts a bill of exchange; and when of age, *A.* directs *B.* to pay the amount out of funds in *B.*'s hands. This contract need not be declared on specially.

A letter is to be presumed to be written on the day on which it is dated, until the contrary is shewn to be the fact.

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Chief Justice gave the defendant leave to move to enter a nonsuit.

Platt now moved accordingly for a nonsuit, or a new trial. First, the declaration should have contained a count stating the agreement in the letter written subsequently to the period when the plaintiff came of age. [*Patteson, J.* Suppose the defendant had pleaded infancy, and the plaintiff had replied a ratification, after the defendant had attained his majority, would that have been a departure?] Secondly, evidence should have been given that the letter was written after the defendant came of age.

DENMAN, C. J.—We all think it lay upon you to shew that the letter was *not* written on the day on which it bore date.

Rule refused.

The KING v. The Justices of MIDDLESEX.

Where a party has been tried at a Court of Quarter Sessions, which has previously lapsed for want of due adjournment, he has a right to have a record of the proceedings made up by the clerk of the peace, although the object of the application is to enable him to support a plea of autrefois convict.

BODKIN obtained a rule, calling upon the justices of Middlesex to shew cause why a writ of mandamus should not issue, commanding them to make up the record of the conviction of *James Bowman*, at the general quarter sessions of the peace and session of oyer and terminer in July last, and to give a copy of such record to *Bowman*, or his attorney.

The affidavits in support and against this rule stated the following circumstances :

Bowman was indicted, tried, and convicted for larceny at the general quarter sessions of the peace for the county of Middlesex, in July last, and sentenced to be transported for seven years, and conveyed to Newgate. It was subsequently discovered that a mis-trial had taken place. The

A Court of Quarter Sessions cannot be adjourned by the crier without the presence of the justices.

crier of the Court, on the first of July, proclaimed an adjournment of the Court, when several justices were in the sessions-house, until the following day, when the Court was again proclaimed to be adjourned, but no justices were present, although several of the justices attended at the sessions-house during the day. On the following day, Wednesday, the Court was again adjourned in the same manner. The witnesses against the prisoner were sworn in Court on the 1st, and the trial took place on the 5th of July. In consequence of these circumstances, a special commission of oyer and terminer, and of general gaol delivery, was issued, to try the prisoner, with others who had been tried at the July sessions; under which, in September last, at the Old Bailey, the prisoner was called upon to plead to an indictment, charging him with the felony of which he had been convicted at the July sessions. *Bowman* pleaded his former conviction in bar, and time was granted to him by the Court to obtain a copy of the record of the conviction. The clerk of the peace for the county of Middlesex was subpoenaed to produce the record. The prisoner was again brought into Court at the October sessions, when the clerk of the peace produced the minutes and documents relative to the former trial of *Bowman*, but not the record of the conviction formally made up. Upon this the prisoner was ordered to remain in custody until the next sessions. In the meantime this rule had been obtained.

Sir J. Scarlett and *Barstow* now shewed cause. The magistrates are in this difficulty: if the record is made up, stating the adjournments as properly made from time to time, that which is untrue will be stated; if, on the other hand, the real state of the case is shewn, the magistrates may expose themselves to great inconvenience. The object of the prisoner is, in the first place, to treat the record of the conviction as valid, for the purpose of defeating the second indictment, and when that object is attained, to invalidate the former trial, and escape from the sentence

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passed upon him. [Dexman, C. J. Could any objection to the first trial appear on the face of the record?] It might be raised by entering the adjournment from day to day. [Patteson, J. That is never done.] It may be done. If the Court grant a mandamus to make up the record, and it is made up, so that the record on the face of it is perfect, the prisoner may bring a writ of error for error in fact. [Dexman, C. J. That is very doubtful. It was refused in *The King v. Carlile*.] (a) Then if he could not bring error, he would be obliged to submit to the sentence of transportation. [Patteson, J. What occurred to me at the trial was this: As soon as the Court pronounces sentence, there is a conviction and a record properly in existence. It is said to be the practice to make up the record afterwards; but can it be said that there is no record of conviction when a man has been actually sentenced by a Court, and when that sentence is actually put into execution by imprisonment?] There is another course open to the party. The proceedings of the Court of Quarter Sessions may be removed by certiorari, if there has been a conviction. It is so laid down in *Hale's Pleas of the Crown* (b). The passage is as follows:—"To conclude this whole matter of auterfoits acquit, convict, or attain, these things are to be observed: 1. The party that pleads the record must plead it specially, setting forth the record. 2. He must either shew the record sub pede sigilli, or have the record removed into the Court where it is pleaded by certiorari; or if it be a record of the same Court, must vouch the term, year, and roll, for the record is part of his plea." [Taunton, J. Does not that law apply only to cases where there is a record to bring up? Here, the complaint is, that there is no record to bring up. The officer has refused to make it up.] It is submitted that it applies to this case. Supposing the certiorari to issue, the justices might return nul tiel record. This Court would not order the record to be drawn up in such a manner as to declare this to have

(a) 4 C. & P. 415.

(b) Vol. 2, p. 255.

last's good session. [Denman, C. J. It strikes us that the prisoner has a right to have a record of that which took place, regularly made up, in order that he may see whether he can make use of it for his advantage. The rule in that case should be moulded differently; at present it assumes that there has been a conviction.] [Littledale, J. The rule is likewise for a copy of the record. This Court has no right to order the justices to give a copy.]

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The COURT directed the mandamus to go, commanding the justices to make up a record of the *proceedings*.

Rule accordingly.

The KING v. The Inhabitants of ST. MARY, COLCHESTER.

UPON appeal, an order for the removal of *Thomas Lester*, his wife and children, from Stratford Saint Mary, Suffolk, to Saint Mary at the Walls in Colchester, Essex, was confirmed, subject to the opinion of this Court on the following case:

The pauper's father had gained a settlement in the parish of St. Mary at the Walls.

In 1811, the pauper was a private in the first regiment of East Essex local militia, commanded by Colonel *Strutt*. On the 24th of April, 1811, the regiment was assembled for training at Colchester, and continued there in training till the 15th of May following, up to which day the pauper was a drummer upon the permanent staff of the regiment. On the 16th of May, the pauper then being off the permanent staff, Colonel *Strutt*, who was perfectly aware that he was in the local militia, hired him for a year at the wages of 10*l*. The pauper served the colonel under that hiring. He resided in the parish of Saint George, Hanover Square, in London, until the 4th of May, 1812; upon which day the regiment was again assembled for training at Colchester. Colonel *Strutt* went there to take the command, and

A settlement is gained by a private, who, whilst on the permanent staff of the local militia, is hired and serves for a year.

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the pauper accompanied him, and was reported as belonging to the regiment. Each officer being by the rules of the service allowed a soldier from the ranks as a personal servant, the pauper was chosen by the colonel to be his servant. The regiment continued to do duty at Colchester till the 19th of May, 1812; during which time the pauper was under military control, but he was only paraded once, and served Colonel S. during the whole period as an in-door servant. The pauper received pay from the crown whilst the regiment was assembled. He also received his wages from his master for the same period. Upon the 16th of May, 1812, Colonel S. paid the pauper his wages of 10*l.*, and upon that day hired him for a year from that time at 14*l.* Under this second contract the pauper continued in the service of Colonel S. till November, 1812, when he was discharged; remaining during the first part of it, that is to say, from the 16th to the 19th, at Colchester, under military control, and serving the colonel as before mentioned. The question for the opinion of the Court is, whether the pauper gained a settlement by his service with Colonel Strutt.

First point.

Austin and Palmer, in support of the order of sessions. The pauper was not *sui juris*, and could not make anything more than a conditional engagement, that is, to serve for a year, provided he was not called upon to do duty in his regiment. There is nothing in the militia act which remedies this defect in the contract. [*Patteson, J.* This is similar to *Rex v. Elmley Castle*(*a*).] That case is inconsistent with *Rex v. Taunton Saint James*(*b*), which was decided after a very elaborate argument upon the acts of parliament relating to this subject. In *Rex v. Elmley Castle*, *Rex v. Taunton Saint James* does not appear to have been much discussed. In that case *Bayley, J.* lays it down that "the words in the 52 *Geo.* 3, c. 68, s. 63, manifestly apply to contracts existing at the time of the ballot or enrolment, and

(*a*) 3 Barn. & Adol. 826. (*b*) 9 Barn. & Cressw. 831.

not to contracts subsequently made," and refers to the language of the 60th section, which enacts, "that the inrolment of servants shall not vacate or rescind contracts between master and servant who shall be called out," and shall leave the service for the purpose of being trained. "That section"—the learned judge goes on to say—"applies to contracts existing at the time of inrolment, for such contracts only could be vacated or rescinded by the inrolment." *Littledale*, J. and *Parke*, J. take precisely the same view of that statute. In *Rex v. Elmley Castle*, Lord *Tenterden* relied only on the 65th section of 52 *Geo. 3*, c. 38.

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The next question is, whether, as the master was aware that the servant was in the militia, it can be considered that he dispensed with the attendance of the servant on the days on which he performed the duties of a soldier; for the affirmative of this *Rex v. Westerleigh* (a), and *Rex v. Winchcomb* (b), may be cited. But in *Rex v. Beaulieu* (c), Lord *Ellenborough* expressed disapprobation of the cases respecting militia-men which had been previously decided. *Rex v. Holnworthy* (d). All the cases of dispensation have proceeded upon the principle that the servant might in fact be considered as working for his master during his absence. Such a presumption cannot arise in the case of a militia-man doing duty. Second point.

Knox, contra, was stopped by the Court.

DENMAN, C. J.—It is quite clear that *Rex v. Taunton Saint James* must have been before the Court in *Rex v. Elmley Castle*. The ground of distinction between those cases is satisfactory, and both may stand together. My brother *Littledale* was a party to the decision of the Court in both those cases.

LITLEDALE, J., TAUNTON, J., and PATTESON, J., concurred.

Order of Sessions quashed.

(a) Burr. S.C. 753.

(c) 3 Maule & Selw. 229.

(b) 1 Dougl. 376.

(d) 6 Barn. & Cressw. 283.

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KELLY v. PARTINGTON.

Words are not actionable with special damage, unless they are of themselves disparaging.

SLANDER. The second count of the declaration stated that the defendant "falsely and maliciously spoke and published, of and concerning the plaintiff, and of and concerning her as such shopwoman or servant, these other false, scandalous, malicious, and defamatory words following: that is to say, she (meaning the plaintiff) secreted one shilling and sixpence under the till, stating, these are not times to be robbed," per quod, &c. At the trial before *Patteson, J.* at the sittings at Westminster, the plaintiff obtained a verdict for 1s. damages upon the whole declaration generally. In last Michaelmas term, upon a question whether the plaintiff was entitled to full costs, or to only so much costs as damages, the Court decided that the words of the above count were *not actionable in themselves* (a). Sir *J. Scarlett* afterwards, in the same term, obtained a rule nisi in arrest of judgment, on the ground that the words in the second count were *not actionable even with special damage*; against which rule

Campbell, S. G., and Bodkin, now shewed cause. In Com. Dig. Action on the Case for Defamation, many rules are laid down as to where words are actionable in themselves; and in (D. 30,) of that title it is laid down, that an action may be maintained for "any words by which the party has a special damage." Any words which are spoken falsely and maliciously with intent to injure another person, by reason of which that party sustains damage, are sufficient to support an action for defamation. [*Littledale, J.* Your proposition, I think, is too general. The words should be in themselves disparaging.] It is submitted that if the words were spoken maliciously (as the jury have found in this case by their verdict), and special damage ensues, an action

(a) See *ante*, vol. ii. 460.

will lie; but it is not necessary to go so far. The words here laid are disparaging, or, at all events, the words may mean either to charge a dishonest or an innocent act, and the jury by their verdict have found that they were disparaging. These words "she has secreted one shilling and sixpence under the till," are clearly of themselves *disparaging*, according to the plain meaning of the words: and as to the words "stating these are not times to be robbed," the expression is at the least equivocal, and must be taken, after the finding of the jury, to mean that the latter words have been used by the defendant.

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Sir J. Scarlett, *contra*. The words must be disparaging in their nature. Can it be said that if a party maliciously said of another that he was honest and upright, with intent to prevent, and that by so doing he did prevent, a person who did not like an honest man, from taking him into his service, this would be a slander? When Chief Baron Comyns says that an action lies "for any words by which the party has a special damage," he means any words which of themselves implied some malice. The malice which renders the words actionable is to be collected from the words, not from the circumstances under which they were spoken. [Littleton, J. Mr. Solicitor General, I see that all the cases put in *Comyns's Digest* are cases of words which are injurious in their own nature.] [Campbell, S. G. There is no instance put in which words were held not to be actionable, because not injurious in themselves, and the rule laid down is general.] The special damage, which is to make words actionable which are not legally so in themselves, must be damage arising out of the words themselves. These words must be taken to be words rather of commendation than of blame, for applying the words "stating, &c." to the plaintiff, as according to the grammatical construction they ought to be, the whole imputes to her that she did a cautious act. The Court will not lay it down generally in the manner contended for,

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that words even of praise (unless spoken ironically) can be actionable with special damage, or that the jury may infer damage to have arisen from them.

DENMAN, C. J.—We cannot look at the former history of the case, but must confine ourselves to the record as it stands. Upon this record the question is, whether the words laid, which are stated to have been spoken maliciously, can be said to have given rise to the special damage laid. I am of opinion that they cannot. It seems to me that unless the Court can see that the words of themselves have an injurious meaning, no action can be maintained upon them. I have no idea that words innocent in themselves can be the subject of an action of slander.

LITLEDALE, J.—I think also that the words of this count with special damage are not actionable, and that the words must be defamatory or injurious in their nature. Though *Comyns* lays it down as a general proposition that any words with special damage are actionable, yet all the instances he gives are of words injurious in their nature but not actionable in themselves, because they impute not a temporal offence, but an offence for which a party could only be proceeded against in the Spiritual Court. The words here laid are extraordinary, and taken altogether impute great caution instead of a crime. If it had not been for the words "stating these are not times to be robbed," an action would, I think, have lain.

TAUNTON, J.—I am altogether of the same opinion. These words must either impute a charge of felony, or be without any meaning at all; and taking the whole together I think that they have no injurious meaning. The person who is stated in the count to have refused, in consequence of the words, to take the plaintiff into his service, ought to have understood them to have no such meaning.

PATTESON, J.—I have always understood that the special damage must be such as would be the natural result of the thing done, in this and every other case in which the special damage is necessary to the support of the action. These words have not an injurious meaning. There is no innuendo that the plaintiff took the money of any other person. We cannot consider the words as slanderous because a party afterwards thought proper to understand them in an injurious sense. I think we are bound to arrest the judgment, as in point of law the damage *cannot* have resulted from the words spoken.

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Rule absolute.

KIRBY v. BANNISTER, GUNNER, HUMPHREY, BASSETT,
and CHAPMAN.

ASSUMPSIT for goods sold and delivered, and money lent. Plea: the general issue, with notice of set-off. At the trial before *Tindal*, C. J., at the Kent Spring assizes, 1833, it appeared from the bill of particulars, that the action was brought against the five defendants to recover the amount of an account furnished to them as churchwardens and overseers of the parish of Hearn, for goods supplied and money advanced to the poor of the parish, from Easter 1826, to Easter 1827. *Bannister* and *Gunner* were churchwardens, and *Humphrey* and *Bassett* overseers of the parish of Hearn, *Chapman* acted as vestry clerk and assistant overseer. The goods were supplied and the money advanced by the plaintiff to the poor, upon orders given by the defendants assembled in vestry, to the paupers who applied for relief. These orders were written by *Chapman*, and were signed many of them by him as "overseer," and some as "vestry clerk and overseer;" several by *Bannister*, and some by the direction of an overseer, may be recovered as such overseer.

In an action against five defendants, as churchwardens and overseers, for goods furnished to the poor by their joint order, it is sufficient for the plaintiff to prove that they all acted as churchwardens and overseers, and signed orders for the delivery of the articles furnished, although one of them be only an assistant overseer. Money advanced to the poor by the direction of an overseer, may be recovered as money lent to

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and one by *Bassett*. No proof was given of the appointment of *Chapman* as assistant overseer under 59 Geo. 3, c. 12. It was objected on behalf of the defendants, that as by the 7th section of that act, the appointment of an assistant overseer is to be for his performance of such of the duties of an overseer as shall be specified in the appointment, the plaintiff was bound to produce the appointment, in order to shew that the nature of the duties which he was to perform were such that he was liable to be sued upon this cause of action with the other defendants, and that such appointment not having been produced, the plaintiff ought to be nonsuited. The learned Chief Justice was strongly of opinion that the defendants were jointly liable, and directed the jury to find a verdict for the plaintiff, but gave the defendants leave to move to enter a nonsuit. Verdict for the plaintiff, damages 115/.

In Easter term, 1833, *Thesiger* obtained a rule nisi for a nonsuit, and also to reduce the damages by the amount of the money advanced by the plaintiff to the poor;—against which

Andrews, Serjt., and *Platt*, now shewed cause. First, as to the nonsuit. *Chapman* acted as overseer, and was one of the contracting parties. It was not incumbent on the plaintiff to produce his appointment. It is true that by the 59 Geo. 3, the inhabitants of a parish have the power, if they think proper, of nominating a person to be appointed by the parties as assistant overseer, with limited duties, so that he might be appointed to act in the character of a mere servant to the overseers; but there was here nothing to shew that *Chapman* acted in such a restricted character; but upon the face of the orders he appears to act as overseer. If, therefore, the duties which he was appointed to perform were of that limited nature that he was not liable to be sued in this action, he should have shewn by the production of his appointment that such was the case.

II. As to the reduction of the damages. The defendants

are liable to the whole amount if they are liable for a part. [*Batteron*; J. This part of the rule was granted upon an objection that overseers are not authorized to borrow money for parish purposes; and that, therefore, if it be lent it cannot be recovered from them.] The plaintiff stands in precisely the same situation as to the money advanced and the goods supplied, for they are in effect the same thing, and there is no authority to shew that overseers may not have money advanced to them for parochial purposes.

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Thesiger contra. In order to support the verdict, *Chapman* must be liable either as assistant overseer, or in consequence of his having from time to time signed the orders. If he is liable for the latter reason, the same test must be applied to the other defendants, and then it will be found that *Humphrey* and *Gunner* ought not to have been joined. [*Denman*, C. J. They all appear to have had some share in the transactions.] *Chapman* was merely an assistant overseer, and acted only as such. His appointment, therefore, should have been produced. It is not necessarily the duty of an assistant overseer to relieve the poor. He is to be appointed by warrant, and the duties which he is to perform are to be specified in the warrant of appointment. The plaintiff, therefore, should have shewn that it was *Chapman's* duty to relieve the poor; which fact, if proved, would have been strong evidence of his liability. In *Bennett v. Edwards* (a), it was held that an assistant overseer was not liable to penalties for refusing to allow the inhabitants to inspect a rate, unless it was proved that that duty was imposed upon him by his appointment. Before a new trial had, the defendant had notice to produce his appointment as assistant overseer, and this not being done, the jury were directed to presume that it was a part of his duty to produce the rate for inspection. But here the appointment was not called for. No evidence of the nature of his duties being given, *Chapman's* character

(a) 1 Mann. & Ry. 482; 7 Barn. & Cressw. 586.

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appeared to have been merely that of an assistant overseer, and he must therefore be taken to have acted as the servant of the overseers, and was therefore not liable. [*Taunton*, J. An assistant overseer need not, of necessity, have a circumscribed duty; and I do not see why we are to assume that *Chapman* was not authorized to act fully as an overseer.] One overseer is not bound by the act of another, unless he concurs; *Malkin v. Vickerstaff* (a). In *Rex v. Justices of Gloucestershire* (b), it seems to be admitted that the law is so, but the point has never been solemnly decided. It does not appear that *Gunner* and *Humphrey* joined in any of the contracts in respect of which this action is brought, and *Bassett* appears only to have signed an order. [*Patteson*, J. Was not that left to the jury? In *Malkin v. Vickerstaff* it was determined to be a question for the jury whether the party ought not to be considered as having relied upon the sole responsibility of the overseer to whom the credit was given, without the knowledge of the others, and without any demand until after they were out of office.]

Second point.

The damages ought to be reduced by the amount of the money advanced. Overseers cannot make a rate for the purpose of reimbursing themselves for money advanced, but are bound to make rates so as to have in hand sufficient money for the purpose of relieving the poor. [*Denman*, C. J. Would you say that if a tradesman supplies goods to the poor at the request of the overseer, and he says I will pay you out of a rate which will be made on Monday, the overseer is not liable?] It has been held that an overseer cannot borrow money for parochial purposes; *Tawny's* case (c). [*Denman*, C. J. Has this ever been determined to be a defence for the overseer borrowing the money?] [*Taunton*, J. We should be cautious about limiting the liability of overseers to pay to tradesmen out of future rates, for otherwise in an interval between the expenditure of

(a) 3 Barn. & Alders. 89.

(b) 1 Barn. & Adol. 1.

(c) 2 Salk. 531; S. C. 2 Lord Raym. 1009; 6 Mod. 97.

past rate and the making and raising a new one, the poor might starve.] *Leigh v. Taylor* (a) also shews that an overseer has no authority, in the character of overseer, to borrow money.

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DENMAN, C. J.—The only doubt I entertained during the argument was, whether it ought not to have been submitted to the jury whether the five defendants had jointly contracted with the plaintiff. What is equivalent to that has been done. The learned judge expressed a strong opinion that the five were liable, and he was not requested to put the question to the jury. They must therefore be taken to have found that the five did jointly contract. I think there is very strong proof they did jointly contract, although they were not joint overseers; it is quite clear they might act in such a manner as to induce a creditor to trust them jointly. There is very strong evidence that this was done. If it had appeared that *Chapman* acted only as servant to the overseers, that would have given the plaintiff warning that he was not to look to him; but *Chapman* sometimes called himself overseer, and put himself in the same situation as the others. Although in the bill of particulars they are called overseers, that does not import that they are overseers in the strict legal definition of the term.

The cases which have been cited upon the second point do not apply to or create any difficulty in this case. *Leigh v. Taylor* merely decides that a surety, who has entered into a bond that the overseer shall account for all sums received by him by virtue of his office, is not liable for a sum of money lent to the overseer, and applied by him for parochial purposes. That is very far from deciding that the creditor has not a right to look to the overseer for money lent for parochial purposes. I can make no distinction in this case between the money advanced and the goods sold.

Second point.

(a) 7 Barn. & Cressw. 491.

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LITTLEDALE, J.—I am of the same opinion. Had the case gone distinctly to the jury, they ought to have found a verdict for the plaintiff. It was not necessary that *all* the defendants should be actually overseers. A tradesman, when he supplies goods, is not bound to see who are the real overseers. It is sufficient for him if he sees them acting as overseers, and by their acts acknowledging their liability. From all the evidence, I think that there was here a joint contract by all the defendants. With respect to the other point it would be very extraordinary if the overseers were not liable for *money* advanced to the paupers by the shopkeeper upon an order from them, and yet were liable for *goods* supplied upon similar orders.

TAUNTON, J., concurred.

PATTESON, J.—This action cannot be maintained unless *all* the defendants are joint contractors; and that, of course, depends upon the evidence at the trial. I take it that it is not necessary that all the overseers should be present when an order for relief is given. If it were so, it would be extremely inconvenient in conducting the affairs of the parish. Here, the jury have found that credit was given to the five defendants, and have substantially found that they were joint contractors. This reduces the case to the point reserved by the learned judge, as to the character in which *Chapman* must be taken to have acted. If he promised jointly with the others, he has rendered himself liable. We are not to assume that his authority was restricted when he acted in an unrestricted manner.

Rule discharged.



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GRAHAM, Executrix of GRAHAM, v. BARRAS.

ASSUMPSIT on a policy of insurance, dated 23d March, 1831, upon the ship *Castlereagh*, from 1st April, 1831, at noon, to 1st January, 1832, at noon; warranted not to sail *foreign* after the time restricted in the Liberal Premium Club Rules (a). Plea: non assumpsit. At the trial before *Alderson, J.*, at the Spring assizes for Northumberland, 1833, a verdict was found for the plaintiff, damages 100*l.*, subject to the opinion of this Court upon the following case:—

A warranty to sail on or before a particular day, is not complied with by leaving the harbour on that day without having a sufficient crew on board, although the remainder of the crew are engaged and ready to sail.

31st August, 1831. The *Castlereagh*, being the property of the testator *Joseph Graham*, and having a full crew ready to take her out to sea, though not all actually on board, was lying moored at St. George's Dock, Dublin, under charter to proceed with freight to St. Andrew's, in the Bay of Fundy, and on the same day was cleared out in the usual way at the custom-house of Dublin.

1st September. About half past three in the morning, the *Castlereagh*, with only the master, mate, one seaman, and two boys, (not then having a sufficient crew on board for the voyage,) dropped down the river Liffey, with a fair wind, to the Pigeon Hole, within the port or harbour of Dublin, assisted by a boat's crew, and arrived at the Pigeon Hole about five in the morning, and came to anchor there. The master returned to the city of Dublin after mooring the vessel in the Pigeon Hole; and after collecting the rest of the crew, and procuring his dispatches, rejoined his vessel in the Pigeon Hole about six o'clock in the afternoon of the same day. About that hour the residue of the crew (which was then complete) came on board at the Pigeon Hole. In the afternoon and evening of the 1st of September the wind was unfavourable for going out to sea; but a little before midnight it became fair, it being then low

(a) *Vide post*, 126, 127, 129.

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water, and the vessel went out as soon after as she could, with a fair wind.

2d September. About half past three o'clock, and with the tide at half flood, the Castlereagh weighed anchor, and sailed from the Pigeon Hole and proceeded on her voyage, and quitted the port of Dublin about half past five o'clock on that morning.

The Pigeon Hole is in the port of Dublin, about two miles below the custom-house, and from the Pigeon Hole to the mouth of the port is two miles further. It was high water at Dublin on the morning of 1st September at forty-nine minutes after five; in the evening between six and seven. The tide in the Liffey is a six hours' tide. Ships of the burthen of the Castlereagh may safely proceed out of the port at half flood. The tide in the Liffey ebbs at about two or three knots an hour, and ships may drop down out of the harbour from the dock or Pigeon Hole with the tide. It was not proved that the defendant was a member or had any ships insured in the Liberal Premium Club. The Castlereagh was totally lost in December, 1831.

The question for the opinion of the Court is, whether the sailing of the Castlereagh, under the circumstances above detailed, constituted a sailing within the terms of the warranty.

Copies of the policy and of the club rules, and warranties of the Liberal Premium Association, were annexed to and formed part of the special case.

The material parts of the sixth warranty were as follow : —“ Not to sail from ports on the west coast of Great Britain, ports in the British Channel, Ireland, or ports in Europe westward of the Downs, after the 1st day of September; but allowed to sail to the Bay of Fundy, and all ports on the east coast of Nova Scotia, as far north as Cape Camo, at all times, on payment of an additional premium, as per scale, on the sum insured.”

The ninth warranty was as follows:—“ The time of clearing at the custom-house to be deemed the time of sail-

ing, provided the ship is then ready for sea, as relates to the sixth, seventh (declaring the latest time of sailing to the White Sea), and eighth (latest time of sailing to the Baltic and ports in the North Sea), warranties; but ships allowed to proceed to any port for the purpose of clearing outward, provided such port and time of sailing be within the limits of the warranties; but in case of not clearing, the master's letter, or such other proof as the committee may think satisfactory, to be deemed sufficient."

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Alexander, for the plaintiff. First, The *Castlereagh* sailed on or before the 1st of September. It is admitted that there was no *actual* sailing on or before that day; but, according to the fair construction of the club rules, there was a *constructive* sailing, which would be equivalent. The policy contains a warranty that the ship shall not "sail foreign after the times restricted in the Liberal Premium Club Rules." Those rules contain a number of warranties and rules. By the sixth warranty ships are prohibited from sailing from ports in Ireland after the 1st of September. If this case therefore rested upon that warranty alone, the plaintiff could not recover. But the ninth warranty meets the difficulty. It is as follows:—"The time of *clearing* at the custom-house to be deemed the time of sailing, provided the ship is then ready for sea, as relates to the sixth, seventh and eighth warranties." Now the *Castlereagh* *cleared* on the 31st August, and had a full crew ready to take her to sea, although not all actually on board. She therefore, in fair construction of law, may be said to have sailed on the 31st of August. It cannot be necessary that the crew should be *actually on board* at the time of clearing in order to bring the vessel within the meaning of the words "ready for sea." In all probability the captain himself would be completing the clearance at the custom-house, and therefore could not, consistently with his duty, be on board. Yet, can it be argued that his absence, under such circumstances, would take the ship out of the protection of the

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ninth warranty? Some of the crew might be, in a boat alongside the ship, assisting to weigh anchor or cast off moorings, yet would their absence from the ship's deck or cabin neutralize the force of the ninth warranty? Unless, however, those two consequences follow, it is difficult to conceive on what principle the mere momentary absence of a part of the crew from the vessel's deck or cabin, although all are ready to take her out to sea, can lead to the same consequences. *Annen v. Woodman* (a) shews that, whilst in harbour, a ship is not unseaworthy on the ground of part of her crew being wanting, nor becomes so until she actually commences her voyage without them. But, assuming that the absence of part of the crew at the time of clearing took the vessel out of the ninth warranty, it, at all events, attached at six o'clock p.m. of the 1st of September, when all the crew were actually on board. If so, the vessel sailed on the 1st September, and was protected by the policy. The ninth warranty has a continuing operation, and, although not attaching, for want of a sufficient crew on board at the moment of clearing, it does attach as soon as that objection is removed. It is true that the vessel did not actually change its position between the arrival of the full crew and half past three a.m. of the 2d September. But there was no necessity, under the ninth warranty, for any locomotion in order to satisfy the term "sailing;" and even if there were, the obstacle to departure being an unfavourable wind, the policy would not on that account be vacated: Per Lord Mansfield, in *Bond v. Nutt* (b). *Moir v. Royal Exchange Assurance Company* (c), which may be cited contra, turned upon the distinction between the words "to sail" and "to depart;" and the decision there applies only where the ship is warranted to "depart." Here the warranty is "to sail." In *Nelson v. Salvador* (d) the vessel was all ready for sea, but, in consequence of threatening

(a) 3 Taunt. 299.

Taunt. 241, S.C.

(b) Cowp. 607.

(d) 1 Moo. & Mal. 309.

(c) 3 Maule & Selw 461; 6

weather; the anchor was not weighed until the morning after the day prescribed; and the Court held it too late. But there the words "to sail" could only be satisfied by an act of locomotion; here the act of clearing is a sufficient sailing, without more being done. *Pitlegrew v. Pringle* (a) will probably be much relied on by the other side; but there the ballast, without which the ship was unseaworthy, was not put on board until *after* the prescribed day for sailing; whilst here the crew were actually all on board upon that day, and the ship in perfect condition for her voyage. Lord *Tenterden* himself seems to put the case very much on that distinction.

But, supposing that the *Castlereagh* did not, in any point of view, sail on the 1st of September, the policy, nevertheless, attached. Her destination was the Bay of Fundy. Now, by the sixth warranty, already referred to, vessels are allowed to sail to the Bay of Fundy at all times, on payment of an additional premium, as per scale, on the sum insured. Unless therefore that payment were a condition precedent to her sailing, she was justified in sailing after the 1st of September. That it was not a condition precedent, appears from the third of the club rules, by which it is provided, that "each and every member shall, on or before the commencement of each voyage or passage, give his acceptance to the secretary for the amount of premium for such voyage or passage as he may be proceeding upon, agreeably to the scale of premiums. Neglecting to give notice, to be liable to a deduction on the sum insured of 5*l.* per cent. in the American and other trades, in case of loss or average; and neglecting or refusing to return bills accepted, or to pay the same when due, ten days after being applied to by the secretary, to cease being insured on receiving a written notice to that effect." Had the first part of this rule stood alone, it might fairly have been said that the giving an acceptance was a necessary preliminary

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avoiding policy.

(a) 3 Barn. & Adol. 514.

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to the commencement of the voyage, and that none having been given in the present case, the voyage never commenced under the policy. But the latter part of the rule expressly points out the consequences to follow from such neglect of notice; and those are, not the vacating of the policy, but a liability to forfeit 5*l.* per cent. on the sum insured. The owner of the *Castlereagh* would consequently incur a liability to action, at the suit of the underwriters, for that sum; and they, on the other hand, would have that indemnity against the owner's neglect. But they could not also insist upon the additional indemnity of the owner forfeiting his protection under the policy. The *Castlereagh* therefore, although not sailing until the 2d. of September, was within the policy, inasmuch as her intended voyage was to the Bay of Fundy, and for such a voyage no particular time is limited.

Second point. *W. H. Watson*, contra. The exception in the sixth warranty does not apply. There must be a tender of the additional premium before the ship is entitled to the benefit of the exception. At all events the increased premium must be ascertained; this is a matter of agreement, otherwise a man may be made an insurer against his will. The scale of increased premium, at the commencement of the Liberal Premium Club Rules, has no bearing on this case. These premiums are for single voyages; this is a time policy. [*Denman*, C. J. There seems to be no doubt whatever upon this point. You need not trouble yourself to argue it. The only question is, whether the case comes within the ninth warranty.]

First point. The ninth rule does not apply to the present policy, for by the policy the warranty "is not to sail foreign after the times restricted in the Liberal Premium Club Rules." Rule 9 is a regulation of the club, pointing out what is to constitute a sailing, but is not a rule as to the time of sailing. The present policy merely incorporates the club rules so far as they relate to the times of sailing foreign, but leaves

what is to be a *sailing* to the ordinary rules of law. Rule 9 certainly does not contain any stipulation as to the *times* of sailing, and the incorporation of it was never contemplated. In *Pittegrew v. Pringle*(a), which was argued upon this rule, the terms of the policy were very different. There *all* the rules and regulations of the club were made part of the policy, and it was found that the defendant was a member of the club; whereas here, the only reference to the club rules is as to the times of sailing foreign. If rule 9 do not apply, then there was no sailing in compliance with the sixth warranty, as the ship did not break ground in a sea-worthy state until after the 1st September. On the 1st September, when she dropped down the Liffey, she had not her crew on board, and she did not break ground in a state to go to sea until the following day. The rule as to what is to be considered a sailing, is accurately laid down in *Lang v. Anderson*(b), by Lord Tenterden, C. J., who says, "It is clear that a warranty to sail, without the word '*from*,' is not complied with by the vessel raising her anchor, getting under sail, and moving onwards, unless, at the time of the performance of these acts, she has every thing ready for the performance of her voyage, and such acts are done at the commencement of it, nothing remaining to be done afterwards." *Ridsdale v. Newnham*(c) establishes the same principle, and is an express authority for the defendant in this view of the case.

But assuming that rule 9 does apply to this policy, the facts do not shew that there was a sufficient sailing either within the terms or the spirit of that rule. The ninth rule provides that the time of clearing at the custom-house shall be considered the time of sailing, provided the ship be *then* ready for sea. The rule of law is, that warranties shall be construed strictly. Construing this rule literally, if at the time of clearing, the ship be not ready for sea, the ship did not sail within that clause; and being ready for sea after the time

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(a) 3 Barn. & Adol. 514.

Barn. & Cressw. 499.

(b) 5 Dowl. & Ryl. 393; 3

(c) 3 Maule & Selw. 456.

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of clearing, is not a sailing within the rule. The ship certainly was not ready for sea at the time of clearing, for she cleared on the 31st of August, and the crew were not on board until six in the evening of 1st September. Although the crew was engaged, unless they were actually on board, the ship was not sea-worthy or ready for sea. It was the same as if the cargo or ballast had been ready, but not on board, as in *Pitlegrew v. Pringle*. Therefore, according to this construction of the policy, the coming on board of the crew after the time of clearing was not a sailing, for the object is to induce parties to have the ship ready, and to sail as soon as cleared. The rule is not capable of the construction, that a readiness for sea, commencing at the last moment, (the ship having cleared before,) is to constitute a sailing.

But construing the rule not literally, but according to the spirit of it, there was here no sailing on the 1st September within the ninth rule. All that was done was merely something which was preparatory to the voyage, and did not amount to a commencement of it.

- Second point. *Alexander*, in reply. It must occasionally, from the relative situations of the parties, be impracticable to tender the additional premium before the ship sails; yet, could it, in such a case, be contended that the owner ought to lose the benefit of the exception? If not, then the construction put upon the sixth warranty and third rule, by the other side, is erroneous. There can be no objection to the admissibility in evidence of the rules and warranties which have been cited. The policy warrants the ship "not to sail foreign after the times restricted in the Liberal Premium Club Rules." Now, in order to understand each and every part of that warranty, such parts of the rules must be looked at as directly or indirectly refer to it. For example, in order to understand what are the "times," the sixth rule must be inspected, because it prescribes them. In order to understand the true meaning of "to sail," the ninth rule must be resorted to, since it gives us one definition of the
- First point.

words, a "clearing at the custom-house." But the sixth rule refers to the payment of an additional premium, as per scale, on the sum insured. In order fully to comprehend that rule, recourse must be had to that which, by reference, is incorporated with it, viz. the scale of premiums, and the mode in which they are to be paid. That introduces the third rule. The sixth and ninth warranties, and the third rule, thus become admissible in evidence for the purpose of explaining the stipulation in the policy. *Worsley v. Wood* (a) and *Routledge v. Burrell* (b) illustrate this principle of evidence. *Ridsdale v. Newnham* (c) is very distinguishable from the present case. There the vessel ought to have sailed on the 28th October, but it was not until the 29th that she obtained her clearance. She was, therefore, obviously a day too late, for at no moment of time on the 28th was she ready for the voyage. Nor could her dropping down the river from Portness to Quebec be construed into a commencement of the voyage, inasmuch as her object in so doing was to obtain her clearance, without which she could not depart, and not for the purpose of commencing her homeward voyage. *Lang v. Anderdon* (d) would have applied, had the words "to sail" been here used in their ordinary sense; but that is not so. Their meaning here is "to clear at the custom-house;" and to do that obviously requires no motion of the vessel. It is conceded that warranties must be strictly performed. Perhaps the strongest instance of that is to be found in *Hore v. Whitmore* (e), where even an embargo by a British governor was held not to excuse a warranty to sail on or before a specified day. But, in this case, the warranty was strictly performed. The vessel was completely equipped for sea at six o'clock, p. m. of the 1st September, and the clearance of the preceding day then, at least, attached, if it did not before.

(a) 6 T. R. 710.

(b) 1 H. Bla. 254.

(c) 3 Maule & Selw. 456.

(d) 5 Dowl. & Ry. 393; 3 Barn. & Cressw. 495.

(e) Cowp. 784.

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DENMAN, C. J.—This is an action on a time policy on a ship warranted not to sail foreign after the time restricted in the Liberal Premium Club Rules. I have felt very great doubt upon the first question, whether you can refer to any one part of the rules except that which relates to the times of sailing. If you cannot, I have no doubt upon the question. But supposing that the rules generally do apply, and that we may refer to the ninth warranty, then the question is, whether the case falls within that warranty. By that rule, the time of clearing at the custom-house is to be deemed the time of sailing, provided the ship be *then* ready for sea. The question is reduced to a very simple point. Was the ship *ready for sea* at the time of clearing? It appears that the crew had been engaged, but where they were does not appear. They may have been ten miles off. I cannot think that the vessel can be considered as having been ready for sea, when there were on board only the master, mate, one seaman, and two boys, and when she could not even get down the Liffey without the assistance of a boat's crew. I think, therefore, that there is no necessity for inquiring further. What took place afterwards cannot alter the question. The assured cannot recover.

First point.

LITTLEDALE, J.—There is no doubt that the vessel, in common understanding, did not *sail*; because though she dropped down the Liffey, which would have been a *sailing* if the crew had been on board, yet there she stopped, and did not take her crew on board until she had lost the opportunity of sailing that day. Mr. *Watson* urges that the defendant does not appear to be a member of the association; but I do not think that circumstance material. In the policy he sufficiently adopts the rules and regulations of

Second point.

the club. The next question is, whether this ninth warranty applies. I am disposed to think it does; and that you are not to construe a policy so strictly as to say that it applies to the regulations as to times, and not to the rules generally. Then supposing that the ninth warranty

is applicable to the policy in question, then comes the inquiry, whether the ship was ready for sea at the time of clearing. The crew were not actually on board. It does not appear why they were not on board. Whether they were at some house of entertainment, or at a distance, or dispersed over Dublin, or the harbour, so as to require four or five hours time in order to collect them, does not appear. I think that the vessel was not ready for sea on the 31st August. The only question then is, whether the vessel must be *then* ready for sea, or whether the clearance is to be considered as continuing, so as to afford its protection to the state of things occurring on the 1st September. On the 1st of September the ship was ready for sea, and I think that the case is substantially within the terms of the warranty. It ought not, I think, to be construed *strictly*. The clearance I regard as a continuing thing, over-riding the whole time down to which the captain might sail.

The argument of Mr. *Alexander*, founded upon the circumstance of the ship's destination being the Bay of Fundy, seems to me to be surrounded with innumerable difficulties.

TAUNTON, J.—I am of opinion, upon a very short ground, that judgment must be given for the defendant; that ground is perfectly satisfactory to my mind. In the policy there is a warranty, that with respect to the time of sailing the ship is to comply with the rules of the club. Nothing can be more clear. The sixth rule states thus: that the ship is not to sail from the coast of Ireland after the 1st day of September. Therefore this simple question arises—did the ship sail or not by the 1st September? I am of opinion that she did not, because at that time she was stationed and remained at the Pigeon Hole. There was no sailing whatever on that day. Then as to the 9th rule, there was some doubt in the mind of my lord, whether that applied. I rather think we ought to take it into consideration, but I think, giving the plaintiff all the advantage of it, there was no sailing within that warranty on the 1st September. Was the ship, at the time of clearing, ready for sea?

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Was she *then* ready for sea? To what can you refer the word "*then*," unless to the time of clearing? It appears that the crew were not then on board. Therefore I am of opinion that she was *not* ready for sea, and this upon the authority of *Pittegrew v. Pringle*, which I think goes the whole length of this case. In that case it was held, that because the ballast was not on board, the ship could not be considered as ready for sea. *Parke, J.*, there says, "Nor could it be said that nothing remained to be done afterwards; for she had to take on board what was material for the prosecution of the voyage, and a larger portion of ballast; and no distinction can be made between the necessity of taking in more ballast, and that of receiving part of the cargo." So here, I say, that at the time of clearing she had not on board all that was necessary for her voyage. As in that case, the larger portion of *ballast*, so here the larger portion of *men*, was deficient. Therefore I am of opinion that our judgment must be for the defendant. I do this with more confidence, because I find no conflicting case. *Lang v. Anderdon* has been referred to; but in that case the ship was on her voyage; here, she was *not* so.

PATTESON, J.—Upon the last clause I entirely agree, that the ship was not ready for sea at the time of clearing; she cleared on the 31st August. The word "*then*" cannot refer to any other time. The case says, that the *Castle-reagh* had her full crew, ready to take her out to sea. This means only that they had been engaged. They might as well say that the cargo had been engaged; it is the same thing in principle. So that if you take the ninth rule into consideration, my opinion is still for the defendant. But I confess I have very great doubt as to whether we can do so. The inclination of my mind is, that the argument of Mr. *Watson* is right. This is not a policy to sail to a particular place, but a *time* policy. However, it is not necessary to decide this.

Postea to the defendant.

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REPLEVIN for taking the goods of the plaintiff in a certain dwelling-house: **Avowry** and cognizance; stating that the plaintiff for two quarters of a year, ending 24th June, 1832, and until &c. held and enjoyed the dwelling-house as tenant to the defendant *Faithful*, by virtue of a demise thereof, at the rent of 24l., payable quarterly on &c.; and because the sum of 12l. of the rent aforesaid, for two quarters, was in arrear, the defendant *Faithful* avowed, and the defendant *Newart* acknowledged &c. The plaintiff took issue on the tenancy as alleged in manner and form &c. The cause came on for trial before *Tindal*, C. J. at the last spring assizes for the county of Surrey; when the following facts appeared:

A memorandum of an agreement to let, which contains words of present demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provides for the preparation of a future lease.

The defendant *Faithful* held in fee within the manor of Ham, in Surrey, the copyhold tenements on which the distress was made. The plaintiff occupied the premises, which he had converted into one dwelling-house under an instrument, of which the following is a copy:—

“Memorandum of an agreement made this 28th day of November, 1831, between *John Faithful*, of &c. of the one part, and *William Warman*, of &c. of the other part. The said *John Faithful* agrees to let to *William Warman*, for a term of 7, 14, or 21 years, commencing at Christmas-day, 1831, at the option of *William Warman*, two attached messuages, with the gardens thereto belonging, situate at &c., at the yearly rent of 24l., payable quarterly, and the first payment to be made at Lady-day, 1832, free and clear of all rates, taxes, or charges, parliamentary, parochial, or otherwise. It is also agreed, that *William Warman* is to paint the inside of the said messuages every seven years, and the outside every five years, and to keep the said messuages in all good and substantial reparations, scourings and cleansings, which may at any time be necessary. It is also further agreed, that whatever buildings or additions may at any time be

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erected on the premises by *William Warman*, shall be left by him when he quits the same, and shall not on any account be removed. And if the said *William Warman* shall be desirous of putting an end to this agreement at either of the said terms before specified, he hereby binds himself to give to *John Faithful* six months' notice in writing of the same. Lastly, it is agreed, that *William Warman* is to pay all the expenses of preparing lease for either of the terms above stated. And in witness &c.

Witness, *W. M.*

John Faithful,

W. E. T.

William Warman."

This agreement was written upon a paper stamped with a deed stamp. The two messuages above mentioned were converted into one by the plaintiff. No rent had been paid before the distress, which forms the subject of this action. The question being raised, whether the above instrument amounted to a lease, the learned judge reserved the point. A verdict was taken for the defendant for 12*l.* for the rent for two quarters of a year, with leave to move to enter a verdict for the plaintiff, damages 4*l.* 4*s.*

A rule nisi having been obtained in last Easter term, pursuant to the leave reserved,

Thesiger now shewed cause. This agreement amounted to an actual demise. There can be no general principle which applies to these cases, but each case must be considered by itself. It is not intended to dispute the correctness of the position of *Gilbert*, C. B. in *Bacon's Abr.* 164, where he says, that "if the most proper form of words of leasing are made use of, yet, if upon the whole deed there appears no such intent, but that it is only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties by construing it a present lease, when the intention was manifestly otherwise." The question is, what is the intention of the parties apparent upon the face of the instrument. It is quite clear that it was intended that this

agreement should be binding on the parties, as there are stipulations which are inconsistent with a contrary supposition. [*Littledale, J.* There are several cases in which an instrument has been held to operate as a demise, notwithstanding it contained an agreement for a future lease. Some doubt arises from the circumstance, that the lessor agrees to let for a term of 7, 14, or 21 years, at the option of the lessee, which seems to imply that *before* the lease is made an option is to be declared.] There are words of present demise. If, instead of introducing the various stipulations as to painting &c. in this agreement, in the manner in which it has been done, it had been agreed that such stipulations should be inserted in the lease, the case would have been different. Here, however, the stipulations are direct and binding upon the agreement alone. [*Taunton, J.* I always considered *Peole v. Bentley*(a) as settling the law upon this question.] In that case it was expressly declared in the agreement, that it should be considered binding till one fully prepared could be produced; but the judgment of Lord *Ellenborough* applies fully to this case, for it is clearly to be implied upon the present agreement, that it was intended to be binding until a more formal lease should be prepared. Lord *Ellenborough* says, "the rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction: and here their intention appears to have been, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties: though when a certain progress was made in the buildings, a more formal lease or leases, in which perhaps the premises might be more particularly described for the convenience of under-letting or assigning, might be executed." *Doe d. Walker v. Groves*(b) is stronger than the present case, because in the agreement upon which the question there turned, it is stipulated, that the future lease shall contain certain cove-

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(a) 12 East, 168.

(b) 15 East, 244.

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nants which are not inserted in the agreement itself. *Pinero v. Judson* (a) is the strongest case. There was in that case an agreement for a future lease, which was to contain particular specified covenants, with a proviso, that in the meantime the lessee should hold the premises upon the covenants specified. The Court held this to be a present demise, chiefly on the ground that the covenants were adapted only to a tenancy for a term. *Dunk v. Hunter* (upon the authority of which the Court granted this rule nisi) was cited in it by *Jones, Serjt.*, though certainly not noticed by the Court in their judgment. In *Dunk v. Hunter* (b) it did not appear upon the instrument when the tenancy was to commence, or the rent to become due. Here the time of the commencement of the holding is specifically stated, so also are the amount of rent and the times of its payment. Nothing is here left in doubt. [*Taunton, J.* In *Dunk v. Hunter* every thing was left uncertain, and no rent had been paid. It was only an executory contract. *Denman, C. J.* No rent has been paid here, but there is a period specified from which the rent is to be computed, which was not the case in *Dunk v. Hunter*. *Patteson, J.* Have you looked at the case of *Colley v. Streeton*? (c) Yes, but no principle is to be extracted from that case applicable here. There is not in this case any exact stipulation for a future lease. It is said, "and lastly it is agreed, that the said *William Warman* is to pay all the expenses of preparing lease for either of the terms above stated." [*Patteson, J.* Is it not rather against your construction that it is to be a lease for one of several terms?] It is clear upon this agreement that the lease is for 7, or for 14, or for 21 years, determinable at the end of either of these terms, by the lessee giving six months' notice. This is clearly binding, unless the parties call for a formal lease. It is true, that in all the cases which have been cited, it was an express term in the agreement, that it

(a) 6 Bing. 206; 3 Moore & Payne, 497.

(b) 5 Barn. & Ald. 322.

(c) 3 Dowl. & Ry. 522.

should be binding until a more formal instrument should be prepared, and that no stipulation to that effect exists here; but such a term is to be inferred as clearly as if it were actually expressed.

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DENMAN, C. J.—I am very unwilling to proceed in the absence of counsel; but Mr. *Platt* obtained the rule nisi upon a particular case, which I do not think supports the position which he contends for. That case was *Dunk v. Hunter*, in which it was held, that an agreement contemplating a future demise, without any stipulation that in the meantime the parties should be bound by the agreement, was to be considered only as an agreement preparatory to a demise, and not to operate as a lease. But under the circumstances of that case, it was not necessary for the Court to go that length. This is an action of replevin, and it is necessary for the defendant, in support of his avowry, to shew that the plaintiff occupied the premises upon which the distress was made, at a certain rent under a demise. I think that the plaintiff did occupy under a demise complete in every respect. The time at which the tenancy was to commence, the amount of the rent, and the various covenants, are all ascertained, so that nothing remains to be done, except to execute a more formal instrument if the parties require it. I confess I think (subject to what Mr. *Platt* may urge, if he thinks proper to say anything in support of his rule,) that this agreement does amount to a lease.

LITLEDAL, J.—There are a great number of cases collected in 2 *Harrison's Digest, Landlord and Tenant*, as to what constitutes a lease, and there are many since the time when that was published; and it appears that there have been many conflicting decisions upon the subject. But if you look back to the old authorities, you will find that they are more clear. In *Com. Dig. Estate (G.)* two cases in *Crō. Eliz.* are referred to. The first is that of

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Harrington v. Wise(a), in which there were articles under seal, which were in this manner:—"Imprimis, it is covenanted and agreed between the parties, that *James Harrington* doth let the said lands for and during five years, to begin at the Feast of St. Michael next following; provided always, that the said *Wise* shall pay to the said *Harrington* annually, during the term, at the Feast of St. Michael and the Annunciation, 120*l.* by equal portions. Also the parties do covenant, that a lease shall be made and sealed according to the effect of these articles on or before the Feast of All Saints next ensuing." One of the points reserved was, whether there was an immediate lease, or but an agreement to have a lease made, by reason of the last words, which refer to a lease *to be* made and sealed. But all the justices held it to be a good lease, for the words *it is agreed* that he doth let, *being in the present tense*, it is a good lease by the words of the agreement; and that which follows is in reference to further assurance, &c. This case is also referred to 1 *Roll. Abr.* 847, *Estate* (X.) The other case referred to in *Com. Dig.* from *Cro. Eliz.* is *Maldon's case*(b), which however is only a nisi prius decision. There it is said, "if one saith to me *you shall have a lease of my lands in D. for 21 years, paying therefore 10*s.* per annum; make a lease in writing, and I will seal it.* This was agreed to be a good lease by parol, although no writing be made of it, for the intent of the lessee is sufficiently expressed, and the making of it in writing is but for further assurance." Upon these old cases it seems to me, that though the authorities have been conflicting of late years, this instrument amounts to a lease.

TAUNTON, J.—This case is settled by *Poole v. Bentley*(c) and other cases since. This instrument amounts to a demise. There are in it words of present demise. The term is to commence at Christmas, 1831, for a term of 7, 14, or 21 years, at the option of the plaintiff, and at the

(a) *Cro. Eliz.* 486.

(b) *Ibid.* 23.

(c) 13 *East*, 168.

yearly rent of 24*l.* payable quarterly, the first payment to be made at Lady-day, 1832. So that the term, the time of its commencement, the amount of the rent, and the time when it is to be paid, are all ascertained. Then it is agreed that the plaintiff shall paint the inside of the premises every seven, and the outside every five years, and shall keep them in repair. It appears to me, that every thing that was intended to be provided for between the parties, has by this instrument been provided for. This is clearly of itself a lease, whatever is said about the future lease, which, I think, is said only for the better security of the lessee, as he is to pay for it, if he thinks proper to require it; *Doe d. Walker v. Groves* (a). Without going through the case of *Dunk v. Hunter*, where the principal ground of decision was, that there was no specific rent agreed upon, or time of commencement of the tenancy determined, it is sufficient to say, that by the instrument in that case scarcely any thing was definitively settled between the parties.

PATTERSON, J.—I entirely agree with the rest of the Court. The distinctions which have been drawn in the different cases have been very nice, but there is nothing extraordinary in that, as the rule is to look for *the intention* of the parties within the four corners of the instrument. But here the rule that all the necessary provisions shall be fully fixed by the instrument, is quite satisfied. I confess I was struck with the clause at the end, by which it is agreed that the lessee shall pay the expenses of preparing a lease for *either* of the terms of 7, 14, or 21 years, which I thought shewed that the term was not fixed. But, looking to the whole of the agreement, and particularly to the clause requiring six months' notice to be given by the lessee in case he should be desirous of putting an end to the tenancy at either of the three terms, I think it quite clear that he had already a lease for 21 years, determinable at the end of 7 or 14 years, at his option. This case,

(a) 15 East, 244.

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I think, comes within the decisions of the three cases of *Poole v. Bentley*, *Doe v. Groves*, and *Pinero v. Judson*.

Rule discharged conditionally.

On a subsequent day in the same term

Platt was heard in support of his rule. But for the clause with which the memorandum concludes, it might have taken effect as a demise after possession taken. In *Roe d. Jackson v. Ashburner* (a), the doctrine regulating cases of this sort was much discussed. All the old authorities were brought before the Court, and Lord *Kenyon* and the other judges delivered judgments which govern this case. It was said that the question, whether a particular agreement was to be considered as a lease, or an agreement for a lease, is a question of intention to be collected from the whole instrument. Is it possible, looking at this instrument, to say that the parties had any other intention than that it should operate merely as an agreement for a lease? There are no terms of present demise, or if there are words which would operate as such if qualified, they are restrained by the clause stipulating that the lessee shall pay the costs of preparing a lease. In *Roe v. Ashburner* the articles of agreement were in this form:—"He shall enjoy and I engage to give him a lease in &c." Lord *Kenyon*, in commenting upon these words, (which were decided *not* to operate as a lease,) said the single question was, what was the intention of the parties using these expressions? "Was it that this agreement should confer the legal interest, or was it not in their contemplation that there should be another instrument to give that legal interest?" Might not the plaintiff, upon this agreement, have brought an action for breach of contract, if upon a tender of a lease the avowant had refused to execute it? Can the Court say that *this* agreement conferred a legal

(a) 5 T. R. 163.


interest? It conveyed no specific term: A Court of Equity would decree a specific performance of the contract, by directing a lease to be granted according to the terms of this instrument; which they would not do if the party had already a legal interest. Lord *Kenyon* says, that all the cases might be answered by the observation, that there were either express words of present demise, or equivalent words accompanied with others to shew the intention of the parties that there should not be a future lease. *Ashhurst, J. and Grose, J.* adopted the opinion of Lord *Kenyon*. [*Patteson, J.* That doctrine has been qualified by later decisions, which say, that where it is to be collected, notwithstanding the stipulations for a future lease, that the parties intended that in the meantime the agreement should be binding, such agreement shall operate as a present demise. *Taunton, J.* In the case of *Barry v. Nugent*, stated in *Roe v. Ashburner*, though there were words stipulating for the future granting of a lease, it was held that the instrument amounted to a present demise, and was recognized as such by Lord *Kenyon* in his judgment; which shews, that the test was not whether or not the parties intended that there should be a future lease.] The words in that case were express and unequivocal, and could have no other meaning than that they should create a present demise. In *Dunk v. Hunter*(a) the words were, "Mrs. H. agrees to let on lease with purchasing clause, for 21 years." There appears to be no substantial difference between the words "agrees to let on lease" and "agrees to let," followed by a provision respecting the expenses of a lease to be made:

DENMAN, C. J.—Upon the former argument we considered the late cases, and we thought the intention of the parties to be clear that this should enure as a present demise. I see no reason now for entertaining a different opinion. The case of *Roe v. Ashburner* would be an au-

(a) 5 Barn. & Ald. 322.

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thority in your favour, if the words of Lord *Kenyon* were taken to be unqualified. But they are clearly not so.

LITTLEDALE, J.—I am entirely of the same opinion as before. In *Goodtitle v. Way(a)*, in which the Court held the agreement not to be a present demise, it was clearly not the intention of the parties that it should so operate.

TAUNTON, J.—I consider this case altogether free from any doubt.

PATTERSON, J.—I see no difficulty at all here. Each case must depend on its own particular circumstances.

Rule discharged.

(a) 1 T.R. 735.

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The Court has no power to alter the docket of an issue, by adding to it the amount of damages and costs, for the purpose of making it a docket of the judgment as of the term when judgment was recovered, pursuant to 4 & 5 W. & M. c. 20: although by that act the duty of docketing judgments is imposed upon an officer of the Court, and it appeared that the practice had long been to docket the issue only before the trial, the judgment roll being afterwards referred to by adding its term and number, and no book for the docketing of issue being kept by the officer.

SEWELL obtained a rule, calling upon *Edward Watts* and *Hannah Watts*, the committees of the defendant, a lunatic, to shew cause why the judgment in this cause should not be docketed nunc pro tunc, pursuant to the statute of 4 & 5 W. & M. c. 20.

The affidavits on which the rule was obtained stated as follows:


The action was commenced in 1827, and issue was joined in Easter term, 1827, in which term the issue was entered and docketed. At the sittings after Hilary term, 1828, a verdict was found for the plaintiff, damages 75*l*. The costs were taxed, and final judgment signed by the Master on

30th May, 1828, in a book kept by him for that purpose at his office. Final judgment was entered on the roll, and the same was carried into the Treasury Chamber on the 9th December, 1828, but was not docketed. The committees of the defendant's person and estate, on 1st May, 1830, executed to *George Hyatt*, a mortgage of defendant's lands. The plaintiff having become a bankrupt, his assignees revived the judgment by scire facias, and having obtained possession of a moiety of the defendant's lands under an elegit, brought an action in the Court of Exchequer against the committees, for rents received by him and paid over to the mortgagee; in which action they were nonsuited, on the ground that the judgment had not been docketed, the question being whether the judgment creditor or the mortgagee was entitled to the priority. It was stated to have been the general practice in this Court, for the last 100 years, not to docket judgments after verdict, but only the issues, and that such issues and dockets are entered in a certain book, kept by the clerk of the judgments for that purpose, and that numbers are affixed to each issue so docketed, corresponding with the number of the judgment roll in the treasury of this Court at Westminster; thus affording an immediate reference to the roll on which the final judgment is entered.

The affidavits further stated facts to shew that Mr. *Tomkins*, the attorney of the mortgagee, had notice of the judgment before the completion of the mortgage.

By an affidavit filed in opposition to the rule, it appeared that the defendant was found and declared a lunatic in May, 1828, and died in last February.

A deponent, in another affidavit in opposition, stated, that he had frequently docketed final judgments after trial and taxation of costs on postea, by applying to the clerk of the judgments and informing him of the amount of damages and costs recovered and allowed in the action; and that the clerk of the judgments thereupon made the docket of the issue into a docket of the judgment, by adding thereto such particulars; for which he was paid a fee of sixpence.

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The clerk of the judgments never enters the said docket of the judgment in manner aforesaid, except he is so applied to by the plaintiff's attorney, and paid such fee of sixpence. It is the practice, where it is intended to affect lands by judgments, to docket them in the manner above described. And when it is intended to enter up final judgment on the roll, after trial and verdict, the *postea*, with the Master's allocatur thereon, is left with the clerk of the treasury at Westminster Hall, who enters up the final judgment; but these entries are totally distinct from the dockets of the judgment which are entered and kept at the King's Bench office, in the Temple.

Joseph Addison, on behalf of the mortgagees, now shewed cause. The statute of 4 & 5 *W. & M. c. 20, s. 2(a)*, requires that the docket shall contain the amount of damages

(a) Sect. 2 enacts, with respect to judgments, in the K. B., that the clerk of the judgments, and every other clerk of the Court, shall, within ten days before the last day of the term next succeeding the term in which any judgments shall be entered, (except as to Easter term, the notes of the judgments in which are to be brought in Michaelmas term, with those of Trinity term,) bring to the clerk of the doggets, notes in writing of all the judgments by him entered in such preceding term, upon *verdicts*, writs of inquiry, demurrer, and every other judgment for debt and damages, which is to contain the names of the plaintiff and defendant, their place of abode, title, trade or profession, (if any such be in the record of the judgment,) and the *debt, damages and costs recovered* thereby, to the end that the same may be by the clerk of the doggets respectively entered in an

alphabetical dogget by the defendants' names, containing the names of the plaintiffs and defendants, titles and additions, *debts and damages*. And that the doggets shall be fairly put into and kept in books of parchment, in the office of the clerk of the doggets, to be searched and viewed by all persons, at reasonable times, upon payment of a certain fee, upon pain that the clerk of the doggets neglecting to do his duty, shall forfeit 100*l.* for each term.

Sect. 3 enacts, that judgments not doggetted shall not affect lands as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in the administration of their ancestors', testators', or intestates' effects.

Sect. 4 gives a fee of 4*d.* to the clerk of the judgments, to be paid by the plaintiff in every judgment by him to be entered.

and costs. Of course, therefore, the docket of the issue, which being made up before trial, cannot contain these particulars, is not the docket contemplated by the act. It is sworn to be the practice, in cases where it is intended that the judgment shall affect lands of the defendant, to make a second application to the clerk of the judgments, who thereupon completes the docket by adding the amount of damages and costs, by which means it is made a docket of the judgment. That has not been done here. The question which is now raised by this application has been already decided by the Court of Exchequer, in the case of *Braithwaite and another v. Watts*(a), which was virtually between the same parties. The plaintiff is not without remedy, because he can recover against his attorney, for neglecting to make the docket according to the practice; and indeed it would seem that this motion is made on the behalf of the attorney, probably in order to secure himself.

In *Douglas v. Yallop*(b), a neglect of entering judgment and a loss of the roll having sufficiently appeared to the Court, a rule was made (in 1759) that the clerk of the judgments should sign a new roll, whereon was to be entered the judgment signed in the cause in M. T. 1729, and filed among the rolls of that term, a special entry being first made expressing the *day of docketing* the same; and it was further ordered, that the judgment should not be made use of against the *administrator* of the defendant. There is a note to that case, in which it is said, that “*Lord Mansfield* intimated that it very much concerned the chief clerk to take care that judgments be *actually entered up* upon the roll in due time and *docketed*; for that after he has received his fees for making such entry, he would be liable to an action on the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up.” And the practice then being for the

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(a) 3 Crompt. & Jerv. 318; 2 Tyrwhitt, 293.

(b) 2 Burr. 722.

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attorney to make the entry, being allowed by the chief clerk a portion of the fees, he said, "that the attorney who had undertaken to do this, and neglected it, would be liable to the chief clerk." In all the other cases of applications made to perfect the judgment in a cause, by entering it up nunc pro tunc, the Court have required that the *docket* shall be of the term in which the *application* was made, so as to protect parties, purchasers, and mortgagees; *Baker v. Baker* (a). In this case it appears, by one of the affidavits, that the defendant died in last February, before this application was made; and it may be that the executor has paid simple contract debts upon the supposition that this was only a simple contract debt, the judgment not being docketed. If so, and the Court should make this rule absolute, it will make the judgment a matter of record, from a time antecedent to the testator's death, and thus render the executor liable to a devastavit. In *Salé v. Crompton*, per nomen *Compton* (b), the Court refused to amend the entry upon the record of a judgment by nil dicit, upon a warrant of attorney, in which the defendant's name was entered *Compton* instead of *Crompton*, as in the warrant of attorney and bill, because they feared that purchasers from *Crompton* might be affected by means of the alteration. In *Evans v. Thomas* (c), the roll of the judgment had been carried in and docketed, but before being filed it was mislaid and lost, and the defendant being dead, and the executrix consenting, the Court, upon motion, ordered that a new roll should be filed, "for there being a docket, it could be no deceit upon purchasers." In *Hickey v. Hayter* (d) it was held, that a judgment against a testator or intestate, not docketed according to the directions of 4 & 5 W. & M. c. 20, is put by that act on a level with simple contract debts, and that therefore, on a plea of plene administravit to debt on a judgment against the intestate not docketed, the defendant may give in evi-

(a) 35 Geo. 3, K. B., cited in Tidd's Practice, 9th edition, 939.

(b) 1 Wilson, 61.

(c) 2 Stra. 833.

(d) 6 T. R. 384; 1 Esp. N. P. C. 313; and see 1 P. Wms. 334, 2 Vern. 750.


dence payment of a bond and other specialty debts, which exhausted all the assets. And in *Steel v. Rorke* (a), it was decided that an outstanding judgment against a testator or intestate, not docketed according to the directions of 4 & 5 W. & M., cannot be pleaded by an executor or administrator to an action on simple contract. The effect of entering up judgment nunc pro tunc, in such cases as this, would be to upset these decisions.

It seems that the argument on the other side will be, that the defect arose from the misprision of the officer of the Court, and from the length of the defective practice; but the affidavits filed in opposition to this application shew that the practice has not been uniform to docket only the issue roll, and that the clerk of the dockets is not bound to complete the docket by entering the demands, unless applied to by the plaintiff's attorney for that purpose.

It seems also that the opposite party mean to contend that Mr. Tomkins, the attorney for the mortgagee, had notice of the judgment prior to the completion of the mortgage, and that the notice is tantamount to a docket. But the Court will not apply the equitable doctrine of notice to this case. A Court of Law will not do any thing which in effect would be to repeal the statute. Mr. Tomkins's notice of the imperfection of the docket was probably the cause which induced him to advise his client that he would be safe in lending his money, seeing that the mortgage would have priority of the judgment. [Taunton, J. The equitable doctrine of notice cannot be applied in this case. The motion assumes the docket to be insufficient, and seeks to make this a perfect legal judgment.]

Follett and Sewell, contra. The question to be decided upon this application is one of great importance, because every, or nearly every judgment in the Court of King's Bench, for the last 100 years, stands in the same position as the present. The Court of Exchequer has certainly de-

(a) 1 Bos. & Pull. 307.


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cided that what has been done here does not amount to a docketing of the judgment. If that had not been the case, there would have been no necessity for the present application. But the Court is now called on to use its own discretion in amending the error. It is submitted that by the mode resorted to in practice, the object of the statute is sufficiently attained. The practice is to enter and docket the issue, and to number it, and then to enter the judgment, and to attach to it a corresponding number, so that no hardship is done to persons searching for incumbrances.

It is always the practice for persons searching for incumbrances to search for the issues; by finding the issue, they, by the present practice, in effect find the judgment, and not only the judgment, but they find that which the mere dogget of the judgments, supposing the statute formally complied with, could not afford them. Suppose an action brought which affected the title to land, in which issue had been entered, but which had not proceeded to trial, the purchaser, by searching the dogget-book of the judgments, would have no notice of such action unless he searched the issue-book as well as the dogget-book, and thus would be compelled to make two searches, whereas by the present practice one is sufficient. [*Taunton, J.* There seems to be very great doubt as to the universality of the practice of the non-docketing of the judgment.] It does not appear to be necessary to consider whether the practice is universal, or how far it is in accordance with the statute. This application is founded on the enabling clause in the 8 *H.* 6, which empowers the Court to amend that which shall be the misprision of the clerks. Here, the act of doggeting the judgment is the act of the clerk. In the first place, it is a duty expressly imposed on the clerk by the statute of *W. & M.*, for the performance of which he receives a fee, and for the non-performance of which he is liable to a penalty. [*Denman, C. J.* Then you have your remedy against the clerk.] That may be a remedy in some cases, but in many cases it would be very inadequate, and in many unattainable. Supposing the

judgment for a very large sum, the penalty is only 500*l*. Again, the clerk may have died, or become insolvent. At any rate, why should the Court drive suitors to the expense and annoyance of an action against its own officer, when it has the power of remedying his errors. This is also an answer to the argument raised by Mr. *Addison*, on the dictum of Lord *Mansfield*, in the note to *Douglas v. Yallop*, supposing that to be any thing more than a loose observation which fell from that learned judge, during the progress of the case, which is very doubtful. It is said, too, that the party may have his remedy by action against his attorney for not docketing the judgment. Supposing this to be so, the same answer applies as above; it would make a case still harder against an attorney, because there is no dogget-book kept for the purpose, but only the issue-book. Nor does it follow because a very careful attorney may have entered the amount of damages and costs as has been allowed to, either that this is a compliance with the act of parliament, or that it is an act peculiarly within his own department; on the contrary, it appears to be a departure from the usual practice, and is one of those cases in which *exceptio probat regulam de non exceptis*.


In *Burroughs v. Stevens*(a), *Heath, J.*, laid it down as a general principle, that the entering of the judgment is so far to be considered the act of the clerk, that if it be not entered in the usual form, and it appears by what precedes on the record what the judgment ought to be, then it ought to be amended accordingly as the misprision of the clerk. Here, the amendment required is *only formal*, the real essentials of the statute having been complied with. But in *Chapman v. Gale*(b), the Court amended the very *substance* of the judgment, and that upon an affidavit stating that the error had been occasioned by the mistake of the attorney's clerk; *Short v. Coffin*(c); *Comyns's Digest, Amendment* (D.) *Douglas v. Yallop* was a judgment by *nil dicat*, and not after verdict. That case therefore is in many points distin-

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(a) 5 Taunt. 554.

(b) 2 Levisz, 22.

(c) 5 Burr. 2730.

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guishable from this, particularly as there could be no docket of the issue, and consequently no notice to purchasers.

This being an appeal to the discretion of the Court, the decisions of the Courts of Equity are applicable. Equity will relieve judgment creditors, though the judgments are not docketed, against purchasers with notice: *Davies v. Lord Strathmore* (a). There Lord Eldon supposes the very case now before the Court, and considers that this Court would amend the dogget as a matter of course, provided the purchasers were not to be damnified. Here, the mortgagee took his security with a full knowledge of the existing judgment, and therefore would not be damnified. If, then, equity will relieve under such circumstances, will the Court compel suitors to have recourse to another jurisdiction in order to give effect to its own judgment? The consequence of refusing to interfere will be, that the clerks of the Court will have the power to annul the judgments of the Court. Again, if the Court will not relieve in this instance, the titles of very many estates will be shaken. Formerly nothing was more common than sales under an elegit. Supposing a bonâ fide purchaser under such an elegit, and the judgment not docketed, the elegit debtor might collude with a fraudulent purchaser or mortgagee, and defeat the title of the purchaser under the elegit. It would open a door to every species of fraud; to relieve themselves from which, parties must have recourse to equity. The judgment of the Court would be in many respects a nullity. The precedent would not be dangerous, inasmuch as each case must stand on its own merits.

Cur. adv. vult.

DENMAN, C. J., on a subsequent day in the same term, said—We have considered this case, and are of opinion that we have no power to alter the docket in the manner proposed by the rule, which must therefore be discharged.

Rule discharged (b).

(a) 16 Vesey, 419.

(b) And see 2 Wms. Saund. 8, n. (3).

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GIBBS and another, Executors of ELIZABETH EDWARDS,
v. SOUTHAM.

DEBT on bond to the testatrix, dated the 2d day of February, 1829, in the penal sum of 1200*l*. On oyer, the condition of the bond appeared to be as follows:—"That if the defendant, his heirs &c. shall well and truly pay unto *Elizabeth Edwards*, her executors &c. the full sum of 756*l*., with interest for the same after the rate of 5*l*. for each hundred pounds for a year, without fraud or delay, then this obligation to be void." Amongst other pleas the defendant pleaded that the said *Elizabeth Edwards*, in her lifetime, did not, nor have or hath the plaintiffs or either of them, since the death of the said *Elizabeth*, after the making of the writing obligatory and before the exhibiting the bill of the plaintiffs against the defendant, demanded payment of the 756*l*. with interest after the rate aforesaid.


A bond, conditioned for the payment of a certain sum *with interest*, may be put in suit without a previous demand of payment.

General demurrer, and joinder.

G. T. White was to have argued in support of the demurrer, but the Court called upon the defendant to support his plea.

Humfrey, for the defendant. It was incumbent upon the plaintiff to make a demand before action. In *Carter v. Ring* (a) an action was brought on a bond conditioned for the payment of 1900*l*. on demand, with interest at five per cent. Plea: no demand made of principal or interest. Replication: a demand upon the defendant as administratrix. The argument of *Abbott* in that case is applicable to this. "The bond," he says, "must have been forfeited before action brought, and it could not have been forfeited till demand made of the sum mentioned in the condition. The stipulation as to the payment of interest clearly shows

(a) 3 Campb. 459.

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that the bond was not to be forfeited till default upon an *actual* demand. The plaintiff here seeks to recover the penalty, which is a collateral sum, and the cases with regard to payment of money on request, where there is an antecedent duty, do not apply." Lord *Ellenborough* adopted this argument, and held that the plaintiff was bound to prove a demand before action brought. [*Denman*, C. J. There the money was payable *on demand*, and issue was taken on the demand.] In *Birks v. Trippet* (a) it was held, that where there is a promise to pay a collateral sum on request, a demand of payment is necessary before action brought, and the declaration must aver a special request. [*Taunton*, J. Can this be called a collateral sum?] The penalty in the bond is a collateral sum. It was so treated in *Carter v. Ring*. In *Simpson v. Routh* (b) it is said by *Littledale*, J., "in the case of a bond with a penalty to pay a certain sum on demand, there an express demand must be made before action brought." Where no time is mentioned, and something is to be done by the obligor, as the payment of interest in this case, there a demand is necessary before the action is brought. [*Littledale*, J. The rule is thus laid down in *Co. Litt.* (c)—"And yet in case of a condition of a bond, there is a diversity between a condition of an obligation which concerns the doing of a transitory act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to be performed presently, that is, in convenient time; and where by the condition of the obligation the act that is to be done to the obligee is of his own nature local, for the obligor (no time being limited) hath during his life to perform it, as to make a feoffment, &c. if the obligee doth not hasten the same by request."] It will be very difficult for the Court to determine what is a reasonable time for the payment of money; but if the Court determine that a request is necessary, there will be no difficulty in the appli-

(a) 1 Saund. 32.

Barn. & Cressw. 682.

(b) 4 Dowl. & Ryl. 181; S.C. 2

(c) 208 b.

cation of the rule. In *Rumball v. Ball* (a) it was decided, that upon an action upon a promissory note, payable *upon demand*, it is not necessary to allege a demand in the declaration. The Court, in giving judgment, said, "It is a debt in *præsenti*, and the words 'promise to pay' import no more than that I am ready to pay the money at any time, and shall not restrain or qualify the other words, this being *no debt arising upon the performance of a certain condition*, but a debt plainly precedent to the demand." The circumstance of interest being payable shews that it was not the intention of the obligor or obligee that the principal sum should be paid immediately. [*Patteson, J.* What difference can the stipulation for the payment of interest make? It is absurd to suppose that in any case where a bond is given, it is intended to enforce the payment immediately. The only object in entering into a bond is to put one party more completely in the power of the other, and this is just the same whether interest is reserved or not.]

DENMAN, C. J.—I cannot discover any reason to doubt in this case. Where a bond is given to secure the payment of a sum of money, the penalty is not a collateral sum. In the case of an ordinary money bond, the liability of the obligor commences immediately, though it is usual to give a reasonable notice to pay before any action is commenced. I never heard of a plea in which the obligor set up the want of reasonable notice as an answer to the action.

LITLEDALE, J.—If this were a single bill (b), the action

(a) 10 Mod. 38.

(b) A single bill is where the debtor is bound by bill or note under seal without a penalty. Where such single bill is made payable on a future day, interest may be recovered *pro detentione debiti*, per Lord Holt, 8 Mod. 167. So, though payable *on demand* and no demand proved. *Ibid.* And see

Lapiere v. Duke of St. Alban's, 2 Lord Raym. 773.

An infant may bind himself by single bill for necessaries, *Cupworth's case*, 1 Roll. Abr. 729, l. 20, pl. 7, (10 Vin. Abr. 381, pl. 7.); *Russell v. Lee*, 1 Lev. 86; *Ayliffe v. Archdale*, Cro. Eliz. 920; and may thereby charge his heirs.

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would be a sufficient demand. Where a bond is in a penalty with a condition, a different rule prevails. There it is necessary to shew a breach of the condition. I entirely concur with the decision in the case of *Carter v. Ring*, that where the condition of the bond is to pay a certain sum *on demand*, and issue is taken on the demand, an actual demand is necessary. In this case the condition of the bond does not make the money payable on demand. It would have been a very different case if it had. The rule laid down in *Comyns's Digest* (a) is this:—"Where a condition is to do a transitory thing without limiting any time, it ought to be done immediately, viz. in convenient time; as an *obligation* to pay money, to deliver charters," &c. The same rule is laid down in *Coke upon Littleton* (b). I think no demand necessary in this case. When an obligor says—*My bond shall be forfeited if I do not pay a certain sum*, he means to bind himself to pay in a convenient time. That was the effect of this bond. I have no doubt whatever upon this plea.

TAUNTON, J.—I think it unnecessary to say more than that the plea is insufficient, and therefore there must be judgment for the plaintiff. *Carter v. Ring* (c) is perfectly distinguishable.

PATTESON, J.—I do not mean to say that a condition *may* not be so worded as to make a demand necessary, but I think clearly that the terms of *this* condition do not make it necessary.

Judgment for the plaintiff.

(a) *Condition*, (G. 5) vol. ii. p. 450. (b) Co. Lit. 208, b. (c) *Ante*, 155.

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J. BESWICK v. JAMES SWINDELLS.

DEBT on bond, dated 7th April, 1813, from the defendant and *John Swindells*, (since deceased,) in the sum of 400*l*. Upon oyer the condition of the bond appeared to be as follows :

Whereas a marriage is intended to be shortly had and solemnized between the above-bounden *James Swindells* and *Elizabeth Etchells*, of Stockport, linen draper, by which event the said *James S.* will become possessed of a considerable stock in trade, goods, chattels, and effects, now the property and in the possession of the said *Elizabeth Etchells*; and it was agreed upon the treaty for the said marriage, and in consideration of the emolument which the said *James S.* would acquire by such marriage, that the said *James S.* should execute a sufficient bond with the plaintiff, to pay unto the children of the said *Elizabeth Etchells*, by her late husband *Edward Etchells*, or the survivors or survivor of them, and the issue of such of them as shall happen to be dead, leaving lawful issue, the sum of 300*l*., to be equally divided between and amongst them, if more than one, share and share alike, and if but one, to such only child, in manner hereinafter mentioned, within twelve months next after the decease of the said *Elizabeth Etchells*, in the event hereinafter specified. Now, therefore, the condition of the before-written obligation is such, that if *James S.*, his heirs &c. shall, within the space of twelve months after the decease of *Elizabeth Etchells*, pay unto the child or children of *Elizabeth Etchells*, by *Edward Etchells*, which shall be then living, or the issue of such of them as shall be then deceased, (such issue taking only the part or share of his, her or their deceased parents or parent,) 300*l*., unto and equally between them in the proportions aforesaid, if more than one, and if but one child, then the whole to such surviving child, *if upon an account taken, the stock in trade and effects in the linen-drapery, hab-*

Upon the marriage of *A.* with *B.*, the widow and successor of *C.* a trader, *A.*, in consideration of the stock in trade which he receives with *B.*, gives a bond to *D.*, conditioned to pay to the children of *B.* by *C.* within 12 months after her death, 300*l*., if upon an account taken, the stock in trade and effects of the business, *if then carried on by A.* shall amount to 400*l*.; but in case upon such account the stock in trade shall amount to less than 400*l*., then *A.* shall pay to such children 120*l*. *A.* during the lifetime of *B.* continues the trade, and ceases to have any stock, this obligation is discharged.

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dashery, or mercery trade or business, (if then carried on by James S.) shall amount to the sum of 400*l.*, but in case, upon such account to be taken as aforesaid, the said stock in trade and effects shall amount to less than that sum, then if the said *James S.* his heirs &c., shall pay unto the said child or children of the said *Elizabeth Etchells*, or the survivor of them, or the issue of such of them as shall be dead, in manner before stated, the full and just sum of 120*l.* within the space of twelve months after the decease of *Elizabeth Etchells*, then the bond shall be void.

Plea: that after the solemnization of the marriage, and long before the death of *Elizabeth* his wife, the defendant retired from and ceased, and from thence hitherto had ceased to carry on the trade and business, or any other trade or business whatever; and that at the time of the death of *Elizabeth*, he the defendant had not, nor has had at any time since, nor has any stock in trade or effects in the linen drapery, haberdashery, and mercery trades and businesses, or in any of them, or in any other trade or business whatever, and that no account of the said stock in trade and effects in the said condition mentioned, was or could be taken at the time of the death of *Elizabeth*, or at any other time from thence hitherto.

Replication: that at the expiration of twelve months after the decease of *Elizabeth*, there were and still are two children of *Elizabeth*, by *Edward Etchells*, and that before the death of *Elizabeth*, one *Nancy Beswick*, another child of *Elizabeth*, by *Edward Etchells*, died, leaving eight children, which children of *Elizabeth Etchells* and *Nancy Beswick* were, at the expiration of twelve months from and after the decease of the said *Elizabeth Etchells*, living.

To this replication the defendant demurred specially, assigning as causes of demurrer, that the defendant has in and by his plea pleaded matter which is a complete answer to the said declaration, and a complete defence to this action, and wholly independent of and unconnected with the fact of *Elizabeth Etchells* having any children by *Edward Etch-*

ells, and yet the plaintiff has not, in and by the said replication, answered, traversed or denied the matter so pleaded by the defendant in and by his said last plea, or any part thereof; secondly, that it appears by the said condition that the said writing obligatory was and is a writing obligatory with, under, and subject to a condition, breaches whereof ought to have been assigned or suggested in or by the said replication, according to the form of the statute in such case made and provided, and yet no breach thereof is stated, suggested or assigned in or by the said replication; and also for that if issue were joined on the said replication, such issue would be wholly immaterial.

Joinder in demurrer.

Wightman, in support of the demurrer. The replication is no doubt bad. The only question is, whether the plea is good. It is to be contended for the plaintiff that the trade ought to have been carried on until the death of the wife, and that then if the stock in trade amounted to 400*l.*, 300*l.* should be paid to the children; and if it amounted to less, then a less sum in proportion was to be paid. But it is submitted, that this cannot have been the intention, and is not consistent with a fair construction of the condition of this bond. If it be suggested that a different construction would afford a ready mode of avoiding the bond by selling off the stock, in anticipation of the wife's death, the answer is, that this would be a *fraudulent* evasion of the bond, and the fraud might have been replied. No fraud having been replied, upon a fair construction of the bond, it is a sufficient defence to say, that the business was not carried on at the time of the wife's death. [*Taunton, J.* May it not be said that the 120*l.* was to be paid at all events?] That part of the condition which says, that if upon an account taken the stock shall amount to 400*l.*, then 300*l.* shall be paid to the children, is subject to the contingency that the trade shall be *then* carried on; and though in the latter alternative this provision is not re-

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peated, yet it is made to overrule the whole, for it is sufficiently referred to afterwards, when it is provided that 120*l.* shall be paid, "in case, upon such account to be taken as aforesaid," the stock shall amount to less than 400*l.* In construing a bond, the condition must be taken most in favour of the obligor. In *Sheppard's Touchstone* (a) it is said, "A single obligation is always taken most in advantage of the obligee, and against the obligor; but it is otherwise of the condition of an obligation, for this is always taken most in advantage of the obligor, and against the obligee." The only case which approximates to this is *Brett v. Pildridge* (b). There the condition of a bond given in contemplation of a marriage was, that if the wife should die without issue within two years, the husband should repay 500*l.* of the portion. The wife had issue, and afterwards she and her issue died within two years, and it was adjudged that the husband should not repay the 500*l.*, for by the having of issue the condition of the bond was fulfilled. This case is not directly in point, but is an illustration of the principle of construction which the Courts adopt. So here, the party is not, within the strict letter of the condition, liable.

Follett, contrà, being engaged in another Court,

DENMAN, C. J. said, it appears to us that the carrying on the trade at the time of the death is an essential part of the condition; we therefore give you judgment, unless *Mr. Follett* comes in and shews us that the judgment is wrong.

Judgment for the defendant nisi.

Follett (c), for the plaintiff. The rule is, that if the defendant in an action upon a bond takes advantage of a condition to that bond, he must shew performance of the

(a) Cap. 21, p. 375.

Clarke, 1 Sid. 102.

(b) In the case of *Goodiar v.*

(c) On the same day.

condition. The defendant here has not performed the condition. It is no part of the terms of the condition of the bond that the trade shall be continuing. The condition does not say that the bond shall be void if the trade does not continue until the time of death. The only answer in excuse of the non-performance of the condition is, that it is impossible to perform the condition; but this is no defence for the obligor, by whose act the performance of the condition has become impossible. In *Sheppard's Touchst.* 378, it is said, "When the thing to be done by the condition is a thing possible at the time of making the obligation, and after by matter *ex post facto*, by the act of God, the act of the law, or *the act of the obligee*, it is become impossible; in this case the obligation and the condition both are become void." Here, the act is not the act of the *obligee*, but of the obligor. It cannot be permitted that the obligor, by his own act, shall discharge himself by making the performance impossible. In the present case, it would be the height of injustice if the obligor having received the whole stock in trade, upon condition of paying 300*l.* to the children, should be at liberty to discharge himself by putting an end to the trade. The authorities upon this subject are collected in *Shepp. Touchst.* chap. 21, and also in *Com. Dig.* (a), and the rule seems to be indisputably settled, that the obligor shall only be discharged by the condition being rendered impossible by the act of God, as it is technically termed, the act of the law, or *the act of the obligee*: but that if the condition be rendered impossible by the act of the obligor, the obligatory part of the bond remains in force, though the condition has become void. [*Patteson*, J. The words are, "if the trade shall be then carried on," which seems to contemplate that the trade may possibly not be carried on. In general a party must shew either performance or the impossibility of performing, arising from the act of the obligee; but here the condition is peculiar, and does not seem to apply to the case of per-

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formance rendered impossible by the act of the obligor.] The condition does not say that the bond shall be void if the trade shall not be carried on. The effect of this condition is, that the party was to pay a certain sum, to be ascertained at a particular time and manner. [*Littledale, J.* The question is, whether the condition has not been rendered impossible by the convention of the parties.] It is apprehended that if a party bound himself in a penalty, conditioned for his payment of 300*l.* if he married *A.*, he would not get rid of his liability by not marrying *A.*, because the omission to do so would be his own act. With regard to the intention of the parties, it is clear that it was intended that the husband should give to the children of the wife the value of what he received with her. [*Denman, C. J.* Upon the question of intentions, I should certainly think it was intended that he should have the power of putting an end to the trade if he thought proper; it might become a losing concern.] It cannot have been intended that in any case he should receive the money, except upon the condition of restoring it. [*Littledale, J.* It is one of the rules laid down in *Comyns's Digest* (a), that in construing the condition of a bond, you are to look at the intention of the parties, and construe liberally.] According to that rule of construction, the defendant would be at all events liable to pay something. There is nothing to shew that he was not to pay 120*l.* if the trade was not carried on. To say that if the party does not carry on trade the bond shall be void, would be to introduce another condition. The defendant has not shewn that he has performed the conditions of the bond, and therefore the penalty is legally forfeited. The bond is become single. The question as to the amount which he is liable to pay, is for another jurisdiction. Suppose a bond by *A.* conditioned to pay 600*l.*, if he should be at Rome within six months, and he was not there:—[*Patteson, J.* Then there would be nothing to pay. It would be a promise to pay upon a condition

(a) Obligation (E.)

which fails.] The non-performance of the condition would be the act of the party himself, and therefore it is submitted that the bond would still be in force. It may have been the intention, by the introduction of the clause in the condition of this bond, to compel the party to carry on the trade.

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DENMAN, C. J.—We will consider of it, and then say whether we wish to hear Mr. *Wightman* in reply.

Wightman, on a subsequent day, in reply. The money is not to be paid unless the business is carried on. The expression “if then carried on,” overrides the whole of the condition. The plaintiff cannot assign a breach of this condition. He can only treat it as a single bill, and it is said to be such. There are only a few cases in which a bond with a condition can be treated as a single bill. It is so where the condition is insensible or impossible, or has become so by the act of the obligor. This is *not* one of those cases. If fraud on the part of the obligor had been suggested here, the case might have been different, but there is no suggestion of the kind. It was obviously the intention that the widow should have the benefit of the trade for her life, and that after her death her husband should have the whole, subject, in such event, to the payment of a sum of money to the children, proportioned to the value of the business at the wife’s death; but it does not follow that the trade was to be carried on at all events. It is said that if a party bound himself to pay a sum of money if he should go to York or Rome, it would be incumbent on him to go to York, and that otherwise the penalty would be forfeited. That is not so, for if the obligor did not go to York or Rome, there would be a defeazance of the condition.

DENMAN, C. J.—It is impossible to say that this is a clear case for either side, because the condition is most obscurely worded. It seems to me, however, that the obligor had full discretion to cease carrying on the business;

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and indeed it is not clear that the ceasing to carry on the trade was the act of the defendant; therefore, I think, our first impression was correct. We do no injustice, and violate no rule of law in saying, that the defendant is discharged from his liability to pay, by an event happening without fault on his part.

LITTLEDALE, J.—I entirely agree. The trade may have been put an end to by the act of the obligee, or by some other cause, independent of the obligor. I do not think that upon this condition the obligor was bound to carry on the trade.

TAUNTON, J.—The payment of money under this condition is made to depend upon the state of the stock in trade at the time of taking an account of it. If upon an account of the stock in trade of the business, “if then carried on,” shall amount to 400*l.*, then so much is to be paid; if less, then 120*l.* The plea states that the defendant retired from and ceased to carry on the trade, and that at the time of the wife’s death he had not any stock in trade in the business, and that no account of the stock in trade and effects mentioned in the condition was or could be taken at the time of the wife’s death. I am by no means satisfied that the circumstance of its being impossible to take an account of the stock in trade renders the bond single. I do not see why we are to infer that it was owing to the improper act of the defendant that the trade was not continued.

PATTESON, J.—I think the defendant is entitled to our judgment, according to our first impression. The condition is an agreement between the parties, to be construed like any other agreement, by looking at the four corners of it. Mr. *Follett* said it would be absurd to have a bond, the condition of which is to be in the option of the obligor to be in a situation to perform or not; but he did not deny that if there had been an agreement to that effect, the bond

might so operate. The question is, what is the agreement between the parties. I think it was in the option of the party to put an end to the trade, if he thought proper to do so. It was, I think, clearly not the intention of the parties to agree that the obligor should carry on the trade, at all events. It is agreed that if he does carry on the trade, with a stock of the value of 400*l.*, he shall pay 300*l.*; and if less, less. So that it is quite clear that he has the power to *diminish* the amount of the stock, and yet it is contended that he has no power to destroy it altogether. I think it is a perfectly clear case.

Judgment for the defendant.

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THOMPSON and another v. JAMES PERCIVAL and
CHARLES PERCIVAL.


ASSUMPSIT for goods sold and delivered. Plea, by *James Percival*, bankruptcy, on which a nolle prosequi was entered; *Charles* pleaded the general issue. On the trial before *Denman, C. J.*, the following facts appeared:—

The defendants were partners until 22d December, 1829, when an advertisement was inserted in the *London Gazette*, announcing the dissolution of the partnership, "and that the business would be carried on by *James P.*, who would receive and pay all debts." The chief part of the goods in question were delivered before the dissolution; other part, to the value of 13*l.* 12*s.* 6*d.*, was ordered by *James P.* after the 22d December. It did not appear that the plaintiffs had any notice of the dissolution, either at the time of the order, or at the time of the delivery. On the dissolution, effects were left in the hands of *James P.* sufficient to pay the partnership debts.

an agreement between *B.* and *C.* that *C.* should accept *B.* as his sole debtor, and should take the bill of exchange from him alone, by way of satisfaction for the debt due from both.

Such an agreement, followed by the receipt of the bill from *B.* would be a good defence by way of accord and satisfaction, in an action by *C.* against *A.* and *B.* jointly.

A. and *B.* being partners, *A.* retires, and *B.* continues the business, having the partnership effects. *C.*, a creditor, being told by *B.* that he must look for payment to him alone, draws a bill of exchange on *B.* for his debt. The bill is dishonoured, and *C.* gives *B.* time to pay. These facts raise a question for the jury, whether there was not

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In the beginning of 1830, the plaintiffs' collector applied for the balance to *James P.*, who told him that *Charles* knew nothing of those transactions, and that the plaintiffs must look to him (*James*) alone. The plaintiffs afterwards drew a bill on *James P.* at three months for the mixed amount, which was accepted by *James P.*, and afterwards dishonoured, and the plaintiffs gave him time to pay, but afterwards brought the present action.

Upon these facts a verdict was taken for the full amount, with leave to move for a nonsuit, if the Court should be of opinion that the plaintiffs had discharged *Charles P.* from the debt (*a*). In Easter term, 1833, *Campbell*, S. G. obtained a rule nisi to set aside the verdict, and enter a nonsuit, or to reduce the verdict to 1*l.* 12*s.* 6*d.*; against which, in Michaelmas term last,

First point :
 Whether retiring partner
 discharged.

Sir *J. Scarlett* and *Chilton* shewed cause. As to the nonsuit, the question in this case is, whether the retiring partner is discharged. Both partners were debtors to the plaintiffs, and if one had given a promissory note which had been dishonoured, the other partner would not have been discharged from payment of the debt. In *David v. Ellice* (*b*), it appeared that the defendant was in partnership with two other persons. He retired from the firm, and notice of that circumstance was given to the plaintiff, who was a creditor of the firm. The plaintiff continued to transact business with the new firm; the balance due from the old firm was transferred to the account of the new firm, and the creditor assented to this, drew a bill of exchange for, and actually received from them a part of the balance. Yet it was held that the defendant continued liable. That decision proceeded upon the principle, that the giving of a bill of exchange by one of two debtors does not absolve the other. Here, goods are sold to two, and a bill of exchange is given

(*a*) The facts were admitted. The counsel for the plaintiff were absent, and the cause on behalf of the plaintiff was conducted by Mr.

James M. Taylor, the attorney in the suit.

(*b*) 7 Dowl. & Ryl. 690; 5 Barn. & Cressw. 196;

by one. [*Parke, J.* There is something more than that. The creditor was told he must draw on the continuing partner alone.] There is no agreement to discharge the other party, though the creditor was to look in the first instance to the continuing partner. [*Parke, J.* That surely is strong evidence of an agreement.] *David v. Ellice* is much stronger than this. [*Parke, J.* It is, but I believe I speak the opinion of some other judges, when I say that I think that decision is not very satisfactory. Suppose the parties had met together, and it had been agreed that the creditor should accept the continuing partner as his creditor?] There would have been no consideration to sustain such an agreement. The transfer of funds from the one to the other would not constitute a consideration. The retiring partner might have taken the whole funds away with him. If, in the case proposed, this stipulation was superadded, that the continuing partner should employ the plaintiff, then the agreement would be valid. There was no evidence in this case of any agreement to relieve the retiring partner from liability. In *Lodge v. Dicas*(a), upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to a creditor: he was informed of this arrangement, and agreed to exonerate the other partner from all responsibility, yet the Court held that, notwithstanding this agreement, both partners were liable for the debt; *Robinson v. Read*(b). The circumstance of the creditors having given time to one of the partners, will not, as in a case of principal and surety, discharge the other; *Bedford v. Deakin*(c), *Walters v. Smith* (d).

As to that part of the rule which relates to the reduction of the damages. In *Fox v. Hanbury* (e), it is said by Lord

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Second point:
 Notice of dis-
 solution.

(a) 3 Barn. & Ald. 611.

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(b) 4 Mann. & Ryl. 349; 9
 Barn. & Cressw. 449.

(d) 2 Barn. & Adol. 889.

(e) Cowp. 449.

(c) 2 Barn. & Alders. 217; 2

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Mansfield, C. J., "If partners dissolve their partnership, they who deal with either, without notice of such dissolution, have a right against both." Notice in the Gazette is not notice to a customer of the firm; *Graham v. Hope*(a), *Gorham v. Thompson* (b). There was notice in the Gazette on the 22d of December, but there is no evidence that the plaintiff was aware of the dissolution, until after the last portion of goods had been ordered and delivered.

Campbell, S. G., and *Hoggins*, contra. *Lodge v. Dicus* proceeded on the ground that there was no consideration; and this is apparent from Mr. Justice *Bayley's* judgment. Here, there is a consideration for the agreement to exonerate the retiring partner. A consideration may be either a detriment to the party promising, or an advantage to the party to whom the promise is made. *Charles P.*, in this case, was lulled into security by the time given to *James P.* Had the demand been made upon the retiring partner, he might have withdrawn the partnership funds from the possession of the continuing partner. *David v. Ellice* is said not to be satisfactory. In *Bedford v. Deakin*, there was no agreement to exonerate the firm. *Robinson v. Read* proceeded upon the want of consideration. This is evident from the first sentence in Lord *Tenterden's* judgment, in which his lordship says, "It does not appear that the defendant sustained any injury in consequence of the plaintiffs having taken the bill from *Edmund Read*." If a party voluntarily, and for his own convenience, takes a bill of exchange from one of two debtors, he discharges the other; *Strong v. Hart* (c). That is the case here. *Wyatt v. Marquis of Hertford* (d), *Reed v. White* (e), and *Evans v. Drummond* (f), are authorities to shew expressly that by

(a) *Peake*, N. P. C. 154.

(b) *Ibid.* 42 b.

(c) 9 Dowl. & Ryl. 189; 6

Barn. & Cress. 160.

(d) 3 East, 147.

(e) 5 Esp. N. P. C. 122

(f) 4 Esp. N. P. C. 89.

taking a bill from the continuing partner, and giving him time, the retiring partner is discharged.

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DENMAN, C. J.—It struck me at the trial that this was no discharge. I understand that a case upon the same point is now pending in the Exchequer. We will therefore take time to consider.

Cur. adv. vult.


DENMAN, C. J., in the course of this term, delivered the judgment of the Court.

The Lord Chief Justice, after stating the facts of the case, and in the course of that statement observing, that as it did not appear that the plaintiff had any notice of the dissolution, either at the time of the order or delivery of the goods, there was no difference between that part of the debt which was contracted before, and that which was contracted after the dissolution, proceeded as follows :

The case was argued in Michaelmas term, before my brothers *Parke, Taunton, Patteson*, and myself.

It appears to us that the facts proved raised a question for the jury, whether it was agreed between the plaintiffs and *James Percival*, that the former should accept the latter as their sole debtor, and should take the bill of exchange accepted by him alone by way of satisfaction for the debt due from both. If it was so agreed, we think that the agreement and receipt of the bill would be a good answer on the part of *Charles Percival* to this demand, by way of accord and satisfaction. It is not necessary to determine whether the assent of *Charles* to this agreement was necessary, in order to give it such an operation; because, if it was, there is evidence of a delegation by *Charles* to *James*, to make such an agreement, for *James* had the partnership effects left in his hands, and was to pay all the partnership debts.

It cannot be doubted but that if a chattel of any kind had been, by the agreement of the plaintiffs and both the

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defendants, given and accepted in satisfaction of the debt, it would have been a good discharge. It is not required that the chattel shall be of equal value, for the party receiving it is always taken to be the best judge of that in matters of uncertain value; *Andrew v. Boughey* (a). Nor can it be questioned, but that the bill of exchange of third persons given and accepted in satisfaction of the debt, would be a good discharge. But it is contended that the acceptance of a bill of exchange by one of two debtors cannot be a good satisfaction, because the creditor gets nothing which he had not before. The written security, however, which was negotiable and transferrable, is of itself something different from that which he had before; and many cases may be conceived in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways: and whether it was actually more beneficial in each particular case, cannot be made the subject of inquiry.


The cases of *Lodge v. Dicas* (b), and *David v. Ellice* (c), are said to be authorities against this view of the law. In the former, however, no new negotiable security was given; nor does the difference between the joint liability of two, and the separate liability of one, appear to have been brought under the consideration of the Court. In the latter, no bill of exchange was given; and that decision, on consideration, is not altogether satisfactory to us. We cannot but think that there was abundant evidence in that case to go to a jury, (and upon which the Court might have decided,) of the payment of the old debts by *Inglis, Ellice, & Co.* to the plaintiff, and a new loan to the new firm; which might have been as well effected by a transfer of account, by mutual consent, as by actual payment of money.

(a) *Dyer*, 75 a.

(b) *Ante*, 169.

(c) *Ante*, 168.

The cases of *Evans v. Drummond*(a), and *Read v. White*(b), are authorities the other way. In the former, Lord *Kenyon* points out forcibly the altered relation of the parties—by the substitution of the bill of the remaining partner for that of the firm; and it is difficult to see on what ground he decided the case, unless upon this, viz. that such substitution, under an agreement, operated as a satisfaction as far as regarded the retiring partner; and in *Read v. White*, Lord *Ellenborough* acted upon that authority, and so directed a special jury of merchants, who entirely agreed with him.

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These cases were afterwards brought to the notice of Lord *Ellenborough*, who expressed his approbation of them, *Bedford v. Deakin*(c), (which was also before the Court in 2 *Barn. & Ald.* 210(d); that case, however, was distinguished from them, because the creditor there expressly reserved the liability of the original debtors.

If, therefore, the plaintiffs in this case did expressly agree to take, and did take, the separate bill of exchange of *James Percival* in satisfaction of the joint debt, we are of opinion that his so doing amounted to a discharge of *Charles*.

No point was expressly made at the trial as to the proof of such agreement, nor was it required that the question should be put specifically to the jury. We think that this ought to be done, and, consequently, the rule must be made absolute for a new trial.

Rule absolute for a new trial(e).

(a) 4 Esp. N. P. C. 89; ante, 170.

(d) *Ante*, 169, 170.

(b) 5 Esp. N. P. C. 122; ante, 170.

(e) And see *Smith v. De Silva*, Cowp. 469; *Malkin v. Vickerstaff*, 3 Barn. & Ald. 89.

(c) 2 Stark. N. P. C. 178.



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HAYS v. TROTTER.

BACKHOUSE and others v. TROTTER.

A defendant's attorney having delivered to his client his bill of costs, from which more than one-sixth is taxed off, cannot afterwards alter that proportion by adding on both sides of the account a sum received by him from his client and paid into Court.

ALEXANDER, in the early part of this term, obtained a rule in the behalf of the defendant, calling upon Mr. *Lowrey*, the defendant's attorney, to shew cause why his bill should not be referred back to the master, and why the master should not allow to the defendant the costs of taxation, upon affidavits stating the following facts:—

The defendant being sued by *Backhouse and Company*, and being advised that it was necessary for him to pay 48*l.* 1*s.* into Court, gave to Mr. *Lowrey* 50*l.* out of which he was to pay 48*l.* 1*s.* into Court, which he accordingly did. An order for the taxation of Mr. *Lowrey's* bill of costs in the above actions having been obtained in last November, the master struck off from the bill, (the debet side of which amounted to 138*l.* 18*s.* 5*d.*.) the sum of 28*l.* 6*s.* 3*d.*, which being more than one-sixth of the whole, he taxed the costs of taxation at 6*l.* 1*s.* 4*d.*, and in his allocatur deducted the same from the balance due to Mr. *Lowrey*. In the bill of Mr. *Lowrey* no notice had been taken of the sum of 50*l.* received, or 48*l.* 1*s.* paid, or of the balance of 1*l.* 19*s.*; but it was agreed during the taxation, that the 1*l.* 19*s.* should be placed to the credit of the defendant. After the allocatur to the effect mentioned had been signed by the master, he having called the defendant's agent before him, permitted the sum of 48*l.* 1*s.*, paid into Court, to be inserted in Mr. *Lowrey's* bill, (although this proceeding was objected to,) and allowed it as a disbursement in the cause of *Backhouse v. Trotter*. The master then made a new allocatur, in which the bill delivered was stated to be 187*l.* 14*s.* 5*d.*, and the amount taxed of 28*l.* 6*s.* 3*d.*, as before, which, not being equal to one-sixth of the amended bill, he refused to allow to the defendant the costs of the taxation.

Cresswell now shewed cause. The bill contained the

disbursements on one side and receipts on the other. It is said in *Tidd's Practice*, upon the authority of the case of *Hindle v. Shackleton* (a), that "if a client in the course of a cause advance money to his attorney for specific disbursements in a cause, those disbursements must nevertheless be included in the bill of costs. Therefore, where a sum was deducted upon taxation less than one-sixth of the amount of the bill delivered, including those disbursements, the Court of Common Pleas ordered the client to pay the costs of the taxation." (b) *Hindle v. Shackleton* is expressly in point. It is apprehended that there can be no doubt but that a payment of money into Court in the course of a cause is a taxable item, such as to make it incumbent on the attorney to include it in the bill to be delivered a month before action brought. The defendant cannot say that the 50*l.* was given as a specific sum for a specific purpose. It was given because the attorney had to pay money into Court, but not to be applied to that specific purpose. [*Denman, C.J.* We are disposed to agree with you. *Alexander.* It was decided otherwise lately in the Court of Exchequer. *Denman, C.J.* Then, Mr. *Cresswell*, we must hear you out.] There appears to be no substantial distinction whatever between this case and that of *Hindle v. Shackleton*.

Alexander, contra. The bill as originally delivered did not include the sum in question; and it seems difficult to say, that an item introduced in consequence of a mere afterthought, as in this instance, can be treated as a part of the bill delivered. The statute 2 *Geo. 2*, c. 23, (made perpetual by the 30 *Geo. 2*, c. 19,) requires the attorney to deliver a bill of his fees, charges, and disbursements, a month before proceeding to recover it; and by the same statute the Court is authorized to refer "the said bill" to be taxed. It follows, therefore, that the bill to be taxed by the master must be the bill delivered to the client;

(a) 1 Taunt. 536.

(b) 9th edition, 336, 7.

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and here the bill delivered did not contain the item in dispute. The master therefore had no jurisdiction as to that item. *Hindle v. Shackleton* is distinguishable from the present case. There the money was given to be disbursed in fees upon briefs which had been delivered. The preparing of briefs, and the payment of fees upon them to counsel, are disbursements necessarily attendant upon the usual course of a cause, but it is otherwise with respect to the payment of money into Court. In *Woollaston v. Hudson*, which was decided a few days ago in the Court of Exchequer, an application was made to rescind an order of *Bolland, B.* requiring the attorney to pay the costs of taxation. The facts were precisely like the present, so far as it was necessary to raise the point now contended for. On the argument, *Hindle v. Shackleton* was cited as a case in point, but the four learned Barons decided that the items in question were not "disbursements" in the usual course of the cause. [*Taunton, J.* What is meant by the usual course of the cause? It is a very vague term.] The costs attending the pleadings, issue, and trial. They also said that the payment in *Hindle v. Shackleton* was essential to the progress of the cause, and such as the attorney would have paid if he had not received the money specifically for the purpose. That observation will not apply here, for it would not have been incumbent on the attorney to pay money into Court, unless it were first delivered to him for the purpose.

The Court sent a message to the Barons of the Exchequer to inquire concerning their decision in *Woollaston v. Hudson*; and afterwards

DENMAN, C. J. said, We have sent to the Court of Exchequer, and we find that they have decided the point exactly as Mr. *Alexander* has stated it. We must consider whether or not this rule ought to be made absolute.

Cur. adv. vult.

DENMAN, C. J. delivered the judgment of the Court.

Without intending to lay down any general rule upon the subject, we think that under the circumstances of this case the sum of 48*l.* 1*s.* cannot be treated as an item in the bill. After the attorney had delivered a bill in which this sum was not included, and from which more than one-sixth had upon taxation been struck off, we think it was not competent to him to add to it this sum in order to make the bill amount to more than six times the sum that had been taxed off, and thus to protect himself from the payment of costs.

Rule absolute.

FAWCETT v. CASH.

ASSUMPSIT for wages. The first count of the declaration stated, that on the 5th March, 1832, in consideration that the plaintiff would enter into the service of the defendant, in the capacity of a warehouseman, at a salary then agreed upon between plaintiff and defendant at the rate of 12*l.* 10*s.* per month for the first year, and an advance afterwards of 10*l.* a year until the salary should amount to 180*l.*, the defendant undertook to retain and employ him in his, the defendant's, service in such capacity *for one whole year* from the day aforesaid; that the plaintiff served the defendant until 28th January, 1833, and was willing to continue to serve for the remainder of the year: Yet the defendant refused to suffer him to continue in his service, and without cause discharged him therefrom: By means whereof &c. The second count stated an agreement to employ until the expiration of six months after notice to determine the service, or else to pay a proportionate part of the wages. The third and fourth counts were similar to the second, except that in the third the notice was stated as a *three months'* notice, in the fourth, *reasonable notice*. The declaration also contained the common indebitatus counts. Plea: the general issue.

A hiring at so much per month is a hiring for a year. A general hiring in the absence of any custom to rebut the presumption, is to be presumed to have been a hiring for a year. A clerk hired at 12*l.* 10*s.* per month for the first year, to advance 10*l.* per annum until the salary is 180*l.*, is hired for at least one year.

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At the trial before *Denman*, C. J. at the London sittings after Michaelmas term, 1833, it appeared that the plaintiff had, on 5th March, 1832, entered the service of the defendant, who on that occasion signed the following memorandum of agreement :—

“ *W. Cash* engages to pay *Thomas Fawcett* 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary is 180*l.*”

“ From 3 mo. 5 (*i. e.* 5th March), 1832,”

The plaintiff continued in the defendant's service until the middle of January, 1833, when he was discharged by the defendant. The plaintiff's wages had been paid monthly up to the 5th January, 1833. This action was brought in Hilary term, 1833, to recover 25*l.*, being the wages of 12*l.* 10*s.* a month from 5th January to the 5th March, 1833, the time at which a hiring for a year from the date of the agreement, supposing it to operate as such a hiring, would expire. *Campbell*, S. G. for the defendant, contended that the plaintiff ought to be nonsuited, for that the four special counts were not proved, and that the action was brought too soon to entitle the plaintiff to recover on a general indebitatus count. Sir *J. Scarlett*, for the plaintiff, contended, that the agreement imported a hiring for a year, and that therefore the first count was proved. He also contended, that the plaintiff was entitled to recover on the fourth count and the indebitatus count. A verdict was entered by consent for 25*l.* leave being given to move to enter a nonsuit.

Campbell, S. G., early in this term, moved accordingly. The verdict was entered for the plaintiff upon the first count, which stated that the defendant had agreed to employ the plaintiff for one whole year, from the 5th of March, 1832. The agreement which was given in evidence does not support that allegation. This agreement does not contemplate that the hiring shall, under all circumstances, continue for a whole year, but that either party shall, upon reason-

able notice, be at liberty to put an end to the relation of master and servant. The agreement was only to regulate the amount of salary, which is to be 12*l.* 10*s.* monthly for the first year, and 10*l.* a year in addition, until it amounted to 180*l.*, which would be in the fourth year. The agreement, if it operated as a hiring for one year, would equally be a hiring for four years; but it was clearly not intended to be a hiring for four years, therefore neither is it for one. [Denman, C.J. The plaintiff went also upon the fourth count, which states an undertaking to employ until a reasonable time after notice, or to pay a proportionate part of the wages for such reasonable period; and also upon the indebitatus count.] Upon the indebitatus count he could not recover, for the action was commenced in Hilary term, 1833, which commenced on the 11th, and ended 31st January, 1833; neither could he recover upon the fourth count, for no evidence was given to support it. With regard to domestic servants, it is certainly pretty well established by custom, that there must be a month's notice or a month's wages, but even there some evidence of custom should be given. Here, no evidence of custom was given. The question therefore comes back to the first count only, and is, whether there is an absolute hiring for a year. [Patteson, J. In *Beeston v. Collyer*(a) the wages were to be paid monthly, and it was held to be a hiring for a year. This shews that the circumstance of the payments being agreed to be made monthly, does not negative the supposition that the hiring is for a year.] That is not contended; but where a man hires a clerk to serve him for a year at so much wages, that does not bind the master for a year. [Littledale, J. Where there is a general hiring paying so much per month, it is for a year, unless it be of a house in a town where there is a custom to take for half a year, or any other case where there is a custom which contradicts the general presumption. Patteson, J. In *Beeston v. Col-*

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(a) 12 B. Moore, 552; 4 Bingh. 309.

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lyer it is laid down in broad terms, that a general hiring of a clerk was a hiring for a year.]

DENMAN, C. J.—I am of opinion that the first count was proved. If the contract would be otherwise for one whole year, the stipulation that the salary shall be advanced 10*l.* per annum until the salary is 180*l.*, certainly does not make it a hiring for less than a year.

LITTLEDALE, J.—I think that this must be taken as a contract for one year, unless there be some rule applicable to clerks, which excepts them from the general rule. The agreement is to pay the clerk 12*l.* 10*s.* per month for the first year, and an advance of 10*l.* per annum until the salary is 180*l.* The whole of this looks as if it was a contract for a year. In the case of domestic servants the rule is well established, and it is an exception to the general rule. The hiring in that case is taken to be according to the custom. The hiring of ready-furnished lodgings is also an exception to the rule by custom. There is no custom proved in this case, and the hiring must therefore be taken to be for a year.

TAUNTON, J.—I am of the same opinion. The statement is, as I understand it, that the defendant undertook to employ the plaintiff as a clerk for one whole year. That is the substance of the first count. It is objected, that there was no proof of such contract. Now this is the engagement:—" *W. Cash* engages to pay *Thomas Fawcett* 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary is 180*l.*" This reservation of salary certainly implies that the contract is to last for more than a year. We need not consider what the case would have been if the cause of action had arisen after the first year. It is perfectly clear that the parties intended that the plaintiff should continue in the defendant's service at least for one year; therefore the contract as alleged was

proved. I think, also, if this had been the case of a settlement, the contract would have proved a yearly hiring.

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PATTESON, J.—This is not the case of a domestic servant, where the contract may be put an end to by paying a month's wages, or giving a month's warning. The agreement either relates to the *time* of service, or it does not. If it does, it clearly proves a hiring for a year; if it does not, then this is a general hiring falling within the ordinary rule, and is a hiring for a year. Therefore the first count was proved.

Rule refused.

WRIGLEY v. SMITH the elder.

ASSUMPSIT on a special promise. Plea: the general issue. At the trial of this cause before Gurney, B., at the Lancashire Spring assizes, 1833, it appeared that the defendant's son had been arrested for 35*l.*, and the plaintiff had, at the request of the defendant (a), and upon the defendant's depositing 40*l.* in the hands of the sheriff's officer, become bail for the defendant's son. Upon the plaintiff's consenting to allow the defendant to receive back from the sheriff's officer the 40*l.* so deposited, the defendant signed the following undertaking:

An agreement to indemnify A. from all costs, charges, damages, or other expenses which he may incur as bail for B. requires an agreement stamp, under 55 Geo. 3, c. 184, the arrest of B., and consequently the liability of A., being for more than 20*l.*, though the costs, &c. incurred, do not amount to that sum.

"I the undersigned John Smith, the elder, do hereby undertake to hold harmless and indemnified John Wrigley, of and from all costs, charges, damages, or other expenses or liability which may be incurred by him or arise, owing to and in consideration of the said John Wrigley having become bail for my son, the above-named defendant in this action."

(a) The consideration being put would be insufficient, if not founded upon a precedent request. The declaration, therefore, would have been bad *ex facie*, if it had not stated such a request, 1 Wms.

Saund. 264. The omission of the words, "at my request," appears to render the written undertaking void; *Saunders v. Wakefield*, 4 Barn. & Alders. 595.

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This instrument was unstamped.

Certain expenses having been incurred by the plaintiff in and about the surrendering the defendant's son to the castle at Lancaster, the present action was brought. It was agreed that a verdict should be taken for 9*l.*, subject to a motion for a nonsuit, upon two grounds; first, that the agreement should have been stamped; and secondly, that it did not appear to be upon a sufficient consideration. In the following Easter term, *Blackburne*, for the defendant, obtained a rule nisi for a nonsuit upon these grounds; against which

Alexander now shewed cause. First, there certainly was a sufficient consideration (*a*). Secondly, the agreement did not require to be stamped, for it does not appear that the subject-matter of it was of the value of 20*l.* The Stamp Act 56 *Geo.* 3, c. 184, schedule Part 1, imposes the stamp duty on agreements only "where the matter thereof shall be of the value of 20*l.* or upwards." In *Chadwick v. Sills* (*b*) it was held, that a memorandum by a wharfinger, of the receipt of goods to be shipped in a particular manner, may be given in evidence, to show the terms in which they were received without a stamp, although the value of the goods was 580*l.*; the wharfage being of a less amount. There is nothing here on the face of the instrument to shew that the costs and charges from which the plaintiff was indemnified would amount to 20*l.* *Latham v. Rutley* (*c*), in which *Chadwick v. Sills* was cited, is to the same effect. So also *Doe v. Avis* (*d*), in which Lord *Tenterden* said, that the words of the act are so ambiguous, that the party objecting that the subject-matter of the instrument is above the value of 20*l.*, ought to make out the affirmative. *Bayley, J.*, in *Orford v. Coles* (*e*), made observations confirmatory of the

(*a*) Existing in fact, and stated in the declaration, but not apparent on the face of the undertaking, and therefore not susceptible of proof.


(*b*) *Ryan & Moody*, N. P. C. 15.

(*c*) *Ib.* 13.

(*d*) 2 *Chitty's Statutes*, 964 n.

(*e*) 2 *Stark. N. P. C.* 351.

remark by Lord *Tenterden* in the last case, when he says, that the part of the enactment which limited the operation of the clause to agreements, the subject-matter of which is above 20*l.*, supposed that the value of the contract was *measurable*, in order to ascertain whether the subject-matter did or did not amount to 20*l.* So *Rex v. Enderby*(a). Here, as in that case, there is nothing to shew that the subject-matter exceeds the value of 20*l.* [*Taunton, J.* For what amount was the party arrested? It must have been for 20*l.* at the least, in order to make it a legal arrest.] If the arrest had been the subject-matter, this would have been an answer; but although the arrest must have been for 20*l.*, it does not follow that the value of the subject-matter of this agreement amounted to 20*l.*

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Blackburne, contra. The liability which the plaintiff took upon himself by becoming bail, is the subject-matter of this agreement, and clearly exceeds 20*l.* [*Patteson, J.* The agreement is to indemnify from all costs, charges, damages, or other expenses or liability which may be incurred or arise, owing to the party's having become bail. One of these is the charge of paying, or the liability to pay *the debt*.]

DENMAN, C. J.—The amount for which the defendant agrees to indemnify the plaintiff is unliquidated; but the agreement cannot, I think, be said to refer to any thing but the costs and charges in the *action* depending, which was for a sum exceeding 20*l.*

Rule absolute (b).

(a) 2 Barn. & Adol. 205.

(b) A contract which, at the time it is entered into, is contemplated by the parties as an engagement not to be completed within the year, must be in writing, as

falling within the 4th section of the Statute of Frauds, (29 Car. 2, c. 3,) though such contract be in fact completed within that period, *Boydell v. Drummond*, 11 East, 142.

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The KING v. WILLIAM HENRY ALLEN, Gent. one &c.

A mandamus does not lie to compel a party who has been elected principal of an Inn of Chancery, to attend before the Benchers of the Inn of Court to which such Inn of Chancery is attached, for the purpose of enabling such Benchers to decide upon the validity of his election, unless it be shewn that the Benchers of such Inn of Court have on some former occasion exercised such jurisdiction *in invitum*.

JESSOPP, in a former term, obtained a rule calling upon the defendant to shew cause why a mandamus should not issue, directing him to attend before the masters of the Bench of the Inner Temple, on such day as they might appoint, and take with him the rules and regulations of the Honourable Society of Clifford's Inn, to enable the said masters of the Bench to decide upon the validity of his election to the office of principal of that society. The rule was obtained upon an affidavit of Mr. Jessopp, which set out, and verified the facts of, a petition which he had presented to the treasurer and masters of the Bench of the Inner Temple; which petition contained a statement in substance as follows:

Clifford's Inn is one of the most ancient Inns of Chancery, and has from the earliest period been subordinate to the Benchers of the Inner Temple. It is under the government of a principal and twelve ancients or *rules*, who, at parliaments holden in the parliament chamber of the society, have been accustomed to make rules and regulations for the due government of the inn and its members. At the period of keeping commons within the inn, the principal and rules of the society assemble at the senior table in the hall of the society, and the fellows or members not being of the degree of ancients or rules, assemble at the junior table of the same hall.

The petition set out the modes of and requisites to a person becoming a fellow or member of the junior table of the inn, or being such fellow, the modes of and requisites to his becoming one of the ancients or rules of the society, as declared by declaratory laws made at parliaments respectively held in June 1822, and December, 1818.

13th May, 1833, a meeting of the rules and fellows of the Society of Clifford's Inn was held in their hall, pursuant to notice and ancient custom, to elect a principal from

amongst the rules, when Mr. *Jessopp* and Mr. *Allen* were proposed and seconded as proper persons, to fill the office. Mr. *Jessopp* objected that Mr. *Allen* was not qualified to fill the office of principal, but the election was proceeded with, and decided in favour of Mr. *Allen*.

The petition then stated various grounds upon which it was submitted to the Benchers of the Inner Temple that Mr. *Allen* was not qualified to be principal of the society, and which grounds were a non-compliance, in several respects, with the declaratory laws of 1822 and 1818.

The petition referred to the chapter in the "Origines Judiciales" of *Dugdale*, on the orders necessary for the government of the Inns of Court, page 312, in which he says, that "The reformation and order of the Inns of Chancery is referred to the consideration of the Benchers of the Houses of Court to which they are belonging, wherein," &c. And again, in the same author, chapter 72, page 322, in which it was said to have been ordered by the judges, in the 16th year of *Charles II.*, "That the Inns of Chancery shall hold their government subordinate to the Benchers of every of the Inns of Court to which they belong, and that the Benchers of every Inn of Court make laws for governing them."

The petition then alleged that an instance of the exercise of the power of deciding upon the conflicting claims of candidates for the office of principal of this inn, would be found amongst the records of the Society of the Inner Temple, in July, 1677, in which case, the election of one *Richard Graham* was confirmed by the Benchers of the Inner Temple, and his competitor, one *Saunders*, was directed to deliver up to him the books, records, &c. of the Society of Clifford's Inn; with which direction, it appears by the records of Clifford's Inn, *Saunders* complied.

The Benchers of the Inner Temple held three meetings to consider the merits of the petition of Mr. *Jessopp*, and, at the last of these meetings, caused an order to be served on Mr. *Allen*, directing him to attend, and to

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produce at the same time the books and regulations of Clifford's Inn. Mr. *Allen*, however, refused to attend, on the ground, as he stated in his affidavits in answer, that he believed the Benchers of the Inner Temple have no jurisdiction in a contest of this nature, &c. except by the voluntary assent of both societies, or when chosen as referees by both parties.

Mr. *Allen* also stated in his affidavit, that he never heard of any claim of jurisdiction by the Benchers, nor of its exercise; nor of the case referred to in the petition of Mr. *Jessopp*; and that no account of such a case is to be found in the books of the Society of Clifford's Inn; that he believes Clifford's Inn to have been of earlier origin than the Inner Temple, and never to have been in any way subordinate to it; and that the Benchers of the Inner Temple have no means of enforcing any order or rule against a member of the Society of Clifford's Inn, nor against any other person not a member of their own body.

Follett now shewed cause. The Benchers of the Inner Temple do not possess, and have not claimed the jurisdiction contended for. There is nothing stated in the affidavits which can authorize the Court to grant this mandamus; and, indeed, in point of law, the Court has no authority to issue a mandamus, for this society is a mere voluntary assembly. [*Littledale, J.* The Benchers themselves do not come forward.]

Jessopp, in support of the rule. It is stated that the Benchers sent to Mr. *Allen* to require him to attend before them. [*Denman, C. J.* We must have proof of the exercise of jurisdiction. The case of *Graham* and *Saunders* does not appear to me satisfactory.] In that case the order made by the Benchers was complied with. Mr. *Allen*, in this case, retains the books of the society. With regard to the power of this Court to grant a mandamus, the authority of this Court over the Inns of Court is as old as the consti-

tution. The simple question seems to be, whether or not the Benchers of the Inner Temple have done wrong in entertaining, upon the petition, the question as to the ineligibility of Mr. *Allen*?

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DENMAN, C. J.—If there had been any evidence of instances of the exercise of that authority which is now claimed to be set in motion against Mr. *Allen*, we might have thought it right to grant a mandamus, that the question might be put in a course of inquiry. No examples of the exercise of the jurisdiction claimed have been shewn; and without that authority we cannot call upon Mr. *Allen* to explain his conduct. We do not say that the Benchers have done wrong. Without casting the slightest censure on the society, I think we must discharge this rule.

LITLEDALE, J.—We must be satisfied that the Society of the Inner Temple have exercised the jurisdiction now attempted to be put in motion. The affidavits do not shew that they have done so.

TAUNTON, J., concurred.

PATTERSON, J.—As far as I can see, the instance which is mentioned by Mr. *Jessopp* does not shew that the Benchers have ever interfered *authoritatively*. It only shews that they decided when the matter was before them. I think we ought to have instances—one at least—in which the Benchers have *compelled* something to be done by the Society of Clifford's Inn, or some of its members.

Rule discharged.



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To an action by an indorsee of a bill of exchange against an indorser who had lost the bill by accident, it is no answer that the plaintiff took the bill under circumstances in which a prudent, cautious, man would not have taken it without inquiries as to the title of the holder, unless circumstances be such that mala fides can be inferred.

Negligence on the part of the loser of a bill of exchange, in not publishing his loss, will not cure any defect in the title of a subsequent holder, in respect of the mode in which the bill came into the possession of the latter.

ASSUMPSIT by one of the public officers of the York City and County Banking Company, upon two bills of exchange, for 26*l.* 19*s.* 9*d.* and 20*l.*, indorsed to the Company, against the defendant as an indorser. At the trial before *Alderson, J.*, at the Yorkshire spring assizes, 1833, the following facts appeared :

The bills in question having been indorsed by the defendant, were lost on the 9th September, 1832, by a lady to whom they were delivered, by her dropping them, enclosed in a reticule, into the canal, between Goole and Knottingley. On the 25th of that month, being the first day of Howden fair, a man, dressed as a sailor or bargeman, accompanied by another person, dressed in the same manner, came to the Company's branch bank at Howden, to have the bill for 26*l.* 19*s.* 9*d.* discounted. The bill was much discoloured, and this circumstance being remarked upon by *Clough*, the clerk of the Company, who was in the management of the business at Howden, the holder accounted for it by stating that it had fallen with his pocket-book into the canal, where it had remained for two days and two nights. This statement was corroborated by his companion. *Clough* then looked at the bill, and finding it indorsed *R. & J. Harrison*, (under which firm the defendant carried on business at Hull,) whom he knew, asked the holder what he took it for. The holder replied, that he had taken it for a cargo of coals; that he had two vessels on the canal with which he traded in coals, and that he required the money for the purpose of purchasing at the fair two horses to draw his vessels. *Clough* then agreed to discount the bill, and the holder, who gave his name as *William Moor*, signed as marksman. It was shewn not to be uncommon for persons in that station to be unable to write. The bill for 26*l.* 19*s.* 9*d.* having been discounted, the bargeman produced the other bill, saying, that if the

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money he had received was not sufficient for his purpose, he would return to have the second bill discounted. In about an hour afterwards he returned for more money, and *Clough* discounted the second bill. *Clough* knew the handwriting of all the parties to the bill; he was aware that *Moor* was a stranger, but he asked for no reference. A clerk of the Bank of England proved that it was the practice at the Bank of England and all its branches, not to discount bills for strangers without a reference. Other witnesses proved the same practice in two banks at Hull, and two at York. It was said to have been "noised all about the country" that the reticule in which the bills were contained had been lost in the canal, but nothing appeared to have been done on behalf of the defendant further than having the canal dragged for some distance, on two successive days, after the loss occurred. The learned judge left three questions to the jury; first, whether *Clough* took the bills bona fide, and in the usual course of business; secondly, whether he took the bills without due caution; and thirdly, whether the defendant used due diligence to make the loss known; and directed them, if they thought that *Clough* had not exercised reasonable caution, to find for the defendant. The jury found that the bills were taken bona fide, but under such circumstances, that a prudent, cautious, man would not have taken them without inquiries. They also found that the defendant did not use due diligence in making the loss known, and that he ought to have advertised it. A verdict was returned for the defendant, leave being given to move to enter a verdict for the plaintiff for 48*l.* 4*s.* 9*d.*, in case the Court should think that the defendant having been guilty of the first negligence, could not object to the plaintiff's right to recover, on the ground of the want of due caution on his part. *Cresswell*, in the following term, obtained a rule nisi accordingly, and in this term the case coming on to be heard, in the absence of *F. Pollock* and *Martin*, who were to shew cause,

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Cresswell supported his rule. The verdict ought to be entered for the plaintiff. Even if the Court hold that negligence in a party discounting a bill, where there is no want of good faith, prevents his recovering against another party, still they will hold otherwise in a case where the defendant has, on his part, acted with negligence. [*Denman*, C. J. There is a case of *Earley v. Crockford* (a), lately decided in the Common Pleas, in which the question was, whether the negligence of the loser of a note is to give title to a taker, who has received it without due caution.] That case is very different from the present, for there was no question there whether the negligence of the loser had in any manner contributed to the taking of the note by the other party. *Parke*, J., a few days ago, at nisi prius, seemed to consider that the question of negligence by the receiver could not arise, except upon a question of mala fides, but that where gross negligence was found, it might be considered that the party had not acted with perfect good faith. Upon looking through the case of *Gill v. Cubit* (b), it is clear that every one of the judges seemed to consider the question in this point of view. [*Denman*, C. J. In a case before Lord C. J. *Best* (c), it was considered that a party who has lost a note ought immediately to give notice of his loss, in such a manner as is most likely to prevent innocent persons from taking it. *Taunton*, J. If it be held that a party must give notice of his loss, an infinity of troublesome questions will arise.]

DENMAN, C. J.—We think in the unsettled state of the laws upon the subject, this case had better go down for a new trial. We will, however, allow the defendant's counsel to shew cause against the rule.

F. Pollock in the course of the same day shewed cause.

(a) 10 Bingh. 243.

(c) *Snow v. Peacock*, 3 Bingh.

(b) 1 C. & P. 487; 5 D. & R. 410.

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In *Gill v. Cubit*, all that the Court said was, that the question of negligence was a part of the question of mala fides, and that a party could not be said to have taken a bill bonâ fide who had taken it without ordinary and proper caution. The circumstances under which these bills were offered to the banker's clerk to be discounted were such as ought to have excited his suspicion, and under which he ought not to have discounted without making some inquiries concerning the holder. The verdict was right, for the negligence of the party losing his property is no answer to the negligence of the party taking it under suspicious circumstances, and this has been expressly decided (a). The only question seems to be, whether the owner has divested himself of the property so that he has ceased to be the true owner; because if he has not, the party receiving without due caution acquires no property in it. The rule of law is, that if both parties are in fault neither shall have any remedy. The plaintiff therefore could not recover against the defendant. Where there has been great negligence on one side and a very little on the other, the jury have the power which they have exercised in this case; as, for instance, it is constantly laid down in the case of a collision of two ships, that if errors have been committed on both sides, neither party can recover; yet if one has committed a common error which any one may fall into, and the other has been guilty of gross negligence, the jury considering the circumstances of the case have given their verdict against the party grossly negligent. There is however in this no principle of law. The jury here have found that the plaintiff took the note bonâ fide, but under circumstances in which a cautious man would not have taken it without inquiry. What is the answer to this? that the defendant did not advertise his loss. This can be no palliation of the conduct of the plaintiff. If the jury have found enough upon the authority of *Gill v. Cubit* and the other cases, to

(a) *Earley v. Crookford*, 10 Bingham 243.

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entitle the defendant to say that the plaintiff has no right to recover upon these bills, the defendant is not prevented from setting up this defence, because he on his part may not have done all that a cautious man would have done. The plaintiff stands on his own right. The conduct of the defendant is independent of, and cannot affect the plaintiff. The plaintiff's right to recover must depend upon what took place at the time when the bills were presented to him to be discounted, and not upon matters of which he knew nothing, and which might never have occurred. The rule is, that when a person takes a note without exercising due care, he acquires no more right than the party from whom he receives it. Can it be said that the negligence of the defendant would have affected his rights as against the party from whom the plaintiff received these notes? It is hoped that if the Court think that the decided cases upon this subject ought to be reviewed, they will select some case in which a greater amount of property is at stake;—a case which, by being carried to the highest tribunal, is likely to settle the law. It is hoped that at all events the Court will not send this case down for a new trial without expressing their opinion upon the law of the case.

DENMAN, C. J.—This is a case in which the law and the fact are so mixed up in the finding of the jury, that I think the rule should be made absolute for a new trial, but I think it is also a case in which we may give Mr. *Pollock* the advice which he requests. My mind does not admit of a doubt but that the plaintiff is entitled to recover. There really is no gross negligence to be imputed to the plaintiff. Whether the defendant's conduct could be set against that of the plaintiff, is another question, which would depend in each case upon the particular circumstances. In *this* case I must say that I do not think that the circumstance of the defendant's not advertising the loss is an answer to any negligence upon the part of the plaintiff. Upon the whole it

seems to me quite clear that the plaintiff is entitled to recover.

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TAUNTON, J.—I do not think that there has been such negligence in the defendant as would prevent his taking advantage of the negligence of the plaintiff. But I also think that there was nothing to prevent the plaintiff from recovering upon these bills. We have already decided to this effect in the course of the present term(a).

PATTESON, J.—It is a very dangerous rule to lay down, that a party shall not recover where he takes a bill under circumstances in which a cautious man would have exercised more circumspection. I cannot approve of the doctrine, and I therefore hope it will be stopped. Where a party receiving a bill has been guilty of fraudulent conduct connected with the receipt of it, I can understand the principle upon which it is held that he ought not to recover.—*Bad faith* I can understand, but not this vague expression.

Rule absolute for a new trial.

(a) The case here alluded to will be found in the next part of this volume.


The editors have thought it more important that they should furnish the profession, as soon as possible, with those decisions, the papers

relating to which have been early accessible to them, than that by delaying the publication of such decisions, they should be enabled to print all the cases of the term in the order in which they have been determined.

DOE d. MARRIOTT v. EDWARDS and others.

EJECTMENT against the defendants, assignees of *Greenacre*, a bankrupt, upon a clause of re-entry in a lease granted by the lessor of the plaintiff to *Greenacre* on the entry, and afterwards mortgages to *D.* all his interest. *C.* may set up as an answer to an ejectment brought by *A.* under the clause for re-entry.

A. having mortgaged to *B.*, demises to *C.*, reserving a power of re- the title of *D.*

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6th September, 1831. At the trial before *Parke, J.* at the sittings at Westminster after last term, it was shewn on the part of the defendant, that previously to the lease to *Greenacre*, the lessor of the plaintiff had mortgaged the premises to *A.*, and had, after the lease, on the 17th September, 1832, executed a second mortgage to *B.*, reciting the first mortgage, and assigning to *B.* all his right, interest, &c. in the premises, both at law or in equity. Upon proof of these facts, the learned judge nonsuited the plaintiff.

Gale now moved for a rule to shew cause why the nonsuit should not be set aside and a new trial had. The execution of a mortgage deed by the landlord did not amount to a determination of his title as against the tenant. In *Doe v. Pegge* (a), *Buller, J.* held that a tenant could not set up the title of a mortgagee, who had not interfered, against his lessor. In *Balls v. Westwood* (b), which was an action for use and occupation, Lord *Ellenborough* decided that a tenant could not refuse to pay his rent after a forfeiture by the landlord, unless he had "divested himself of the possession he had obtained under the plaintiff, and commenced a fresh holding under another person." *Doe d. Whittaker v. Hales* (c) shews that a mortgagee may recognize a legal title remaining in the mortgagor. *Doe d. Rogers v. Cadwallader* (d) does not overrule that case, but decides that a payment and receipt of interest do not alone amount to a recognition.

As there has been no attornment in fact, it is not competent to the tenant to set up a conveyance void at common law, and operating by force of the statute 4 & 5 Ann. c. 16, s. 9. This statute, though general in its terms, cannot be set up by the tenant, as against whom it dispensed with attornment. The statute 13 Eliz. avoids all leases made by ecclesiastical persons, but it has been repeatedly held that they are good

(a) 1 T. R. 760, n.

(b) 2 Campb. 11.

(c) 7 Bingh. 322; 5 M. & P. 139.

(d) 2 Barn. & Adol. 473.

against the lessors themselves. A decision that it is the mortgagee who must distrain and do all other acts which are to be done by the landlord, will very much diminish the value of securities of this kind. It usually happens that a tenant is ignorant of his landlord's incumbrances, but in a register county he will search the register, (as he has done here,) and if he finds a mortgage of the premises, will set his landlord at defiance.

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Cur. adv. vult.

On a subsequent day in the term,

DENMAN, C. J. said—In this case the rule prayed for must be refused. (His lordship then stated the facts, and proceeded.) We agree with my brother *Parke*, that the lessor of the plaintiff cannot, after having executed a mortgage deed, assigning all his right, interest, &c. in the premises, both at law and in equity, recover against the tenant for a forfeiture.

Rule refused (*a*).

(*a*) After a mortgage has become absolute, by nonpayment on the day, the mortgage conveyance becomes an absolute alienation, operating at law as any other conveyance of the class which may have been adopted for the purpose of vesting the legal estate in the mortgagee.

In the present case, if the mortgage to *A.* was in fee, or for the whole period of the mortgagor's interest, and the lease to *Greenacre* was subsequent to the day on which the mortgage became absolute, as the mortgagor had then no estate in him, the lease, if by indenture, would create a fee simple by estoppel at common law, between lessor and lessee, subject to the term. To this reversionary fee simple by estoppel, the next

reversion would be incident. The mortgage to *B.* would operate as an assignment of this legal reversion, and also of the equity of redemption remaining in the mortgagor after the first mortgage.

If the mortgage to *A.* was for a less period than the interest of the mortgagor, the lease to *Greenacre*, after the mortgage had become absolute, would operate at law as a lease of the reversion expectant upon the mortgage term, leaving an ulterior reversion in the mortgagor, to which ulterior reversion the rent and right of re-entry would be incident. The mortgage to *B.* would operate as an assignment of this ulterior reversion, with its incidents, if the second mortgage were co-extensive with the mortgagee's then interest, or as a

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demise of that reversion with its incidents, if the second mortgage were for a less period.

In all these three cases the right of re-entry would vest in *B.*, whose title the defendants might set up in answer to this ejectionment.

If at the time of the lease the first mortgage had not become absolute, then as an interest would pass by the lease, neither party would be estopped from shewing,

that upon the nonpayment of the first mortgage money, the estate of the mortgagor had ceased. Under these circumstances the defendants might also set up the title of *A.* the first mortgagee, as an answer to the action. And if the lease were by parol or by deed poll, they might set up the title of *A.* although the first mortgage had become absolute before the lease. Co. Litt. 45 a, 47 b, 363 b.

—◆—
 JAMES T. WILLIAMS. (a)

"As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date. 14th January, 1833."
 Held, that no action lies on this undertaking, inasmuch as no consideration appears upon the face of the instrument.

ASSUMPSIT on a guarantee. Plea, the general issue. At the trial before the under-sheriff of Middlesex, by a writ of trial under 3 & 4 *Will.* 4, c. 42, s. 17, the following instrument, signed by the defendant, was given in evidence:

"Mr. James—As you have a claim on my brother for 5*l.* 17*s.* 9*d.*, for boots and shoes, I hereby undertake to pay the amount within six weeks from this date. 14th January, 1833."

It was objected that this undertaking was void by the Statute of Frauds, as no consideration appeared on the face of it. The under-sheriff considered the objection fatal. A verdict was therefore found for the defendant, and leave given to the plaintiff to move to set aside that verdict, and enter a verdict for himself. In Hilary term *Barstow*, in this Court, obtained a rule nisi accordingly, against which, in the Bail Court,

R. V. Richards shewed cause before *Patteson, J.*—
 This case cannot be distinguished from *Wain v. Warlters* (b),

(a) The editors have been favoured by Mr. *A. S. Dowling* with this report of the arguments in this case.

(b) 5 East, 10; 1 Smith, 229, S. C., *S. P. Seagoode v. Meak*, Precedents in Chancery, 560.

in which case, where one person promised in writing to pay the debt of another person, without stating for what consideration ; it was held, that parol evidence of the consideration was inadmissible by the Statute of Frauds, and consequently, such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum*, and gave no cause of action. So again, in *Cole v. Dyer (a)*, where the guarantee was in this form :

“*R. R.* plaintiff, and *J. A.* defendant. We, the undersigned, jointly and severally undertake and agree to pay *G. C. C.*, gent. the debt and full costs in this action, provided, on or before the 1st day of January, 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him the said *G. C. C.* at his office, as the attorney for the plaintiff. Dated this 6th day of November, 1830.” And containing in the margin the following letters and figures : “Debt, 6*l.* 11*s.* 11*d.*; costs, 4*l.* 18*s.* 4*d.*; 11*l.* 10*s.* 3*d.*”

The Court there held that the instrument did not shew a sufficient consideration to take it out of the Statute of Frauds. This latter case is still stronger than the former. [*Patteson, J.* The question is, whether a man promising to pay the debt of another necessarily implies a consideration to forbear.]

Barstow, contra. In this case the facts are these : The brother of the defendant is indebted to the plaintiff, who is a shoemaker, and the defendant is desirous that his brother should have time. The plaintiff required that he should have the written undertaking of the defendant for the payment of the sum in which the brother was indebted. Accordingly, the present guarantee was given. The question is, whether a sufficient consideration appears on the face of it to take it out of the Statute of Frauds. In *Wain v. Warlters* the question was, whether it was necessary that any consideration at all should appear on the face of the guarantee,

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and not what would make up such a consideration ; and therefore the question is left open by that case as to what will constitute a sufficient apparent consideration on the face of the guarantee. The question therefore is, whether the Court can collect from the writing itself, that a consideration was intended to be expressed. In *Newbury v. Armstrong*(a), the language of the guarantee was :

"To Mr. *John Newbury*, sen.

"I, the undersigned, do hereby agree to bind myself to be security to you for *John Corcoran*, late in the employ of *J. Pearson*, of Loudon Wall, for whatever you *may* intrust him with while in your employ, to the amount of 50*l.* ; and in case of any default, to make same good. Dated 11th March, 1828, and signed *W. Armstrong*."

There *Tindal*, C. J. said, "The Statute of Frauds requires that an agreement to answer for the default of another, shall be in writing, and the word agreement has been held to include a consideration, for without one there is no valid agreement. The question here is, whether a consideration appears on this agreement, or is to be collected from it by fair and necessary implication. In my opinion, the consideration appears. The language is, to be security to you for *J. Corcoran*, late in the employ of *J. Pearson*, for whatever you may intrust him with while in your employ. That is, if you will intrust one who has left the service of another. The words are all prospective. It may fairly be implied that *Corcoran* had left one service, and that the guarantee was given in consideration of his being taken into another. We ought not to be too strict in the construction of these instruments ; for if every agreement entered into be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." Adopting the rule of construction supplied by this case, the consideration of the undertaking on the part of the defendant does sufficiently appear. The obvious meaning of the

(a) 6 Bingham, 201 ; 3 Moore & Payne, 509.

words is, "if you will wait six weeks I will pay you." Although these very words are not used, that was clearly what the parties meant and understood by the language of the guarantee. In *Cole and another v. Duffield, clerk(a)*, the language of the guarantee was :

"Sir—I undertake to guarantee to you the payment of 100*l.* now due to the estate of Mr. *William Goodwin*, currier, a bankrupt, from Mr. *Henry Wilson*, shoemaker, King-street, Cambridge, for articles which have been delivered to him for the use of his trade or business as a shoemaker, so that this my guarantee shall not be put in force against me for that sum for two whole years from the date hereof. Dated April 3, 1820."


There the Court held, that although there was no *direct* consideration expressed on the face of the guarantee, yet it might be construed with a previous letter, pointing out the times on which the guarantee was to be given, and a subsequent one, recognizing it, in order to constitute the consideration of it. The judgment of *Richardson, J.*, in that case, applies strongly to this. In point of principle, the last case is not distinguishable from the rest. If this guarantee were taken in conjunction with the previous and subsequent communications between the parties, there would be no doubt that a sufficient consideration was shown. If it were to be construed by any person of plain sense, would there be any doubt that, after this guarantee had been given, no proceedings were to be taken for the recovery of the debt due from the defendant's brother to the plaintiff?

PATTON, J.—I will look into the cases, and communicate my opinion to-morrow.

Cur. adv. vult.

(a) 7 J. B. Moore, 252.

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The rule having been granted in this Court before the four judges,

PATTERSON, J. now delivered his judgment here.

This was an action upon a guarantee in these words :

“ Mr. *James*—As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date. 14th January, 1833.”

The plaintiff was nonsuited, on the ground that the consideration for the promise did not appear on the face of the instrument. In the course of the argument, *Wain v. Warlters* was referred to, which was confirmed by *Saunders v. Wakefield* (a). It was contended that here the consideration did appear on the face of the instrument. The rule of construction was not disputed, that you are bound to find the consideration in the instrument. But you must collect from the expressions in the instrument what the consideration is, not as a matter of conjecture, but with certainty. *Wain v. Warlters* was precisely this case, and it did not occur to the counsel in that case to adopt the argument used upon this occasion (b).

(a) 4 Barn. & Ald. 595.

(b) But in 3 Brod. & Bingh. 21, *Jenkins v. Reynolds, Park*, J. says, “ I do not go into the question whether the fact was well decided in *Wain v. Warlters*, because there may be different opinions as to whether or not a consideration did appear on the instrument which was there the subject of discussion.” And in the same case, (6 B. Moore, 106,) *Richardson, J.* says, “ I agree with my brother *Park*, that it is not necessary for us to give any opinion as to whether a consideration appeared on the face of the instrument in *Wain v. Warlters*, but

that we may decide on the principle there contained, viz. not only that the promise must be in writing, but that the consideration for the promise must be shewn.”

It seems to be questionable whether after acceptance of a guarantee in the form given in *Wain v. Warlters*, or in the principal case, the creditor would not be precluded from suing the principal debtor, until the stipulated period had elapsed. If the creditor would be so precluded, the consideration would be sufficient.

It is not, however, in all cases necessary that the contract be synallagmatic, viz. that the consi-

The last case, *Cole v. Dyer* (a), which is the same in effect as this case, I cannot distinguish from those two cases. The rule must therefore be discharged. There

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deration of the guarantee be binding upon the creditor. A contingent resulting or springing consideration is sufficient. Thus, where *A.* guarantees to *B.* the price of goods which *B.* may hereafter furnish to *C.*, *B.* contracts no engagement to furnish goods to *C.*, but if he does furnish them, the consideration arises, and the guarantee attaches; *Minett, Ex parte*, 14 Ves. 189; *Gardom, Ex parte*, 15 Ves. 286; *Warrington v. Furber*, 6 Esp. N. P. C. 89; *Stapp v. Lill*, 1 Campb. 242; *S. C.* per nomen *Stadt v. Lill*, 9 East, 348.

It is, however, of course competent to a party to stipulate that his guarantee shall not be binding without an express undertaking on the part of the promisee to perform that which, but for such stipulation, would have been a mere contingent consideration; *Gaunt v. Hill*, 1 Stark. N. P. C. 10.

A contingent consideration appears to be clearly insufficient to support a promise to pay an existing debt. Where, therefore, the guarantee is in this form, "I, *G. B. M.* hereby guarantee the present account of *H. M.* due to *R. T. S.* & Co. of 112l. 4s. 4d. and what she may contract from this date to the 30th September next," the guarantee appears to be void for the 112l. 4s. 4d. And if void in part, it would be void for the whole, according to *Lexington v. Clarke*, 2 Ventris, 221. This ob-

jection does not appear to have been taken in *Russell v. Moseley*, 3 Brod. & Bingh. 211; more fully reported 6 B. Moore, 521.

"In New York, it has been decided, that the consideration, as well as the promise, must be in writing; *Sears v. Brink*, 3 Johns. Rep. 210. But if the promise be under seal, that of itself imports a consideration; *Livingston v. Tremper*, 4 Johns. Rep. 416. And, however sufficient the consideration, the promise must be in writing; *Jackson v. Rayner*, 12 Johns. Rep. 291. But where the guarantee or promise to pay the debt of another is made at the same time with the contract to which it is collateral, it is incorporated with the original transaction, and becomes an essential branch of it; the whole is one single bargain; and the want of consideration, as between the plaintiff and the guaranteeing party, cannot be alleged; *Leonard v. Vredenburg*, 8 Johns. Rep. 22, (2 edit.) and the cases cited in the reporter's note. *Wain v. Warlters*, 5 East's Rep. 10, is recognized, in *Sears v. Brink*, as having given a sound construction to the statute. But the authority of both those cases has been questioned by Chancellor *Kent*, 8 Johns. Rep. 29. Lord *Eldon*, in *Ex parte Minet*, 14 Ves. jun. 190, expressed a decided opinion against *Wain v. Warlters*, saying, 'There was a variety of cases directly

(a) 1 Cromp. & Jer. 401.

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was a case of *Coe v. Duffield* cited by Mr. *Barstow*, who relied on what fell from *Richardson, J.*, in that case. Every thing laid down by that learned judge is entitled to very great weight, but I think the meaning of Mr. Justice *Richardson* was mistaken. What Mr. Justice *Richardson* said related to the first letter written by the defendant to the plaintiff, and not to the guarantee.

DENMAN, C. J., and the rest of the Court, expressed their concurrence.

Rule discharged.

contradicting it.' Chief Justice *Parsons*, and Chief Justice *Parker*, have, in effect, overruled it; *Hunt v. Adams*, 5 Mass. Rep. 360; *Adams v. Bean*, 12 Mass. Rep. 139; and Chief Justice *Swift* has stated the reasons for his unwillingness to consider the case as authority, in a very learned opinion, which is inserted in Mr. *Day's* edition of *East's Reports*, vol. 5, p. 20. In New Jersey, the Supreme Court have lately decided that it is not necessary that the consideration of a written undertaking to pay the debt of another, should be expressed in or appear upon the alleged agreement; *Buckley v. Beardsley*, 2 South. Rep. 570. One of the judges, however, dissented, upon the

ground that the written memorandum did not contain, as well the consideration as the promise. In Pennsylvania, the Act of Assembly, for Prevention of Frauds and Perjuries, contains no provision upon the subject of a promise or agreement to answer for the debt of another. In Virginia, the statute requires only that the promise should be in writing; *Violet v. Patton*, 5 Cranch, 142. The Court, however, said, their opinion in that case was not determined by the circumstance, there being a consideration expressed in the assignment; *Gordon, Ex parte*, 15 Ves. jun. 286 n.—Note to American edition of *Vesey*, 15. 286.

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ASSUMPSIT for work and labour &c., in which, by an order of *nisi prius* made at the last Norfolk summer assizes, it was ordered by the Court, with the consent of the parties, that a verdict should be entered for the plaintiff for 500*l.* damages and 40*s.* costs, subject to a reference to Mr. *Walter*, a surveyor, who was to be at liberty to certify to the associate what should be paid for the whole of the work done by the plaintiff for the defendant; and that the associate should be at liberty to enter a verdict according to such valuation; the plaintiff thereby admitting the receipt by him of certain moneys, and the payment of a certain sum into Court; so as *W.* should make and deliver his certificate in writing of and concerning the matters referred to the associate before a certain time; with liberty however to enlarge the time; *W.* to have power to examine the parties and their witnesses on oath, and the parties to be bound to produce all books and papers relating to the matters in difference; any party wilfully preventing *W.* from making his certificate, to pay such costs as this Court should think reasonable and just; the costs of the cause, reference, and certificate, to abide the event of the said reference; and that both parties should abide by the certificate, and should neither of them bring any writ of error, or prosecute any action or suit at law or in equity against *W.*, or against each other; and that either party should be at liberty to move to make the order a rule of Court.

The rule of E. T. 2 G. 4, requiring the grounds of objection to an award to be stated upon a rule nisi to set it aside, applies to the certificate of an arbitrator empowered to ascertain the amount due from the defendant to the plaintiff, and to certify the same to the associate, by whom a verdict is to be entered accordingly.

A certificate, ascertaining the amount due, having been sent by *W.* to the associate, the order was in the following Michaelmas term made a rule of Court; and on the same day *Storkes, Serjt.*, upon certain affidavits, obtained a rule, calling upon the defendant to shew cause why the valuation of Mr. *Walter* made in this cause should not be set aside, and a new trial had. The grounds upon which it

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was sought to set aside this valuation were not set out in the rule nisi, and therefore, on its coming on to be heard in this term,

Storkes, Serjt. was called upon to support his rule. This is not an *award* upon a regular reference at nisi prius. The reference was not to make an award, but to ascertain the amount due and certify it to the associate, who was thereupon to enter a verdict for the amount. This in no respect has the qualities of an award, so that either party could take advantage of it as such. It could not be enforced by attachment, nor could an action be brought upon it. The only remedy which the plaintiff could have, would be upon the verdict, over which this reference has no immediate control. [*Patteson*, J. This is nothing more than an ordinary certificate, though under an order of reference with rather larger powers than usual.]

DENMAN, C. J.—I am disposed to think that the rule requiring the grounds of objection to be set out in the rule nisi does apply in this case. I think that it is in substance an award. If it is moved to set it aside as an award, the particular objection should be set out according to the rule.

LITTLEDALE, J. and TAUNTON, J. concurred.

PATTESON, J.—Either this is a note to the officer, or it is an award. If it was merely a note to the officer, the motion should have been differently framed. The defendant should have applied to set aside the verdict.

Rule discharged.

ant, one &c. *T. MORGAN*, Executrix of *MORGAN*.

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PLEADINGS. The defendant pleaded that she had administered, and that "she hath not nor had *on the exhibiting the bill* of the said plaintiff in this behalf, any time since hath had any goods or chattels" *re of the testator at the time of his decease to be red.* Replication: that the defendant "on the exhibiting the bill of the said plaintiff in this behalf & goods and chattels" &c. which were of the testator's at the time of his decease, in her hands to be administered of great value. Upon this, issue was joined. *trial before Patteson, J. at the Carmarthen spring 1833, it appeared that the action was commenced by summons sued out on the 8th, and served on December, 1832, on which the amount of the debt was assessed as required by the rule (a), but in which the defendant was not described as executrix. The learned judge refused to receive evidence tendered by the plaintiff having come to the hands of the defendant after the service of summons served, or to permit the defendant to pay debts of equal degree by her as executrix subsequently to that period; deciding (against the defendant for the plaintiff) that the day of exhibiting the bill mentioned in the issue, must be taken to be the day on which the action was commenced by the writ of summons, and not the day of filing the declaration; and the argument for the defendant) that though the summons did not describe the defendant in her representative character, it was such notice of an action, that she would be liable to a devastavit in respect of payments subsequently made of debts of equal degree with that of the plaintiff. Both parties being confined to the time of issue of the process, the case went to the jury upon evidence given of assets and administration up to that time. The jury upon this evidence found a verdict for*

Plene administravit and no assets at the time of the exhibiting of the bill pleaded after the Uniformity of Process Act, (2 W. 4, c. 39,) was held after verdict to refer to the commencement of the suit.

Whether the service of a writ of summons under 2 W. 4, c. 39, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him in that character, so as to render him liable to a devastavit if he pay debts of an equal degree with that sued for, between the service of the writ of summons, and the filing the declaration, *quære.*

(a) R. II, 2 W. 4, reg. II.

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the plaintiff, damages 20*l*. In the following Easter term *Chilton*, for the defendant, obtained a rule nisi for a new trial, on the ground of the improper rejection of the evidence of payments; against which

John Evans and *E. V. Williams* now shewed cause. The evidence was properly rejected. The issue must be understood to relate to the commencement of the suit,—or to the filing of the declaration,—or it is insensible.

First point:
 Relation of
 allegation to
 commence-
 ment of ac-
 tion.

I. If the allegation in the defendant's plea means that the defendant had not assets at the time of the commencement of the suit, then the verdict is right, for the payment of debts by the defendant since that time could not be given in evidence under the issue; and therefore the question as to the effect of the service of the writ of summons, as a notice to the defendant of an action commenced, cannot arise. It is obvious, that if the service of process was not notice to the executrix, the payments afterwards made by her of debts of equal degree, without notice of an action commenced against her as executrix, should have been pleaded.

Second point:
 Relation to
 filing of decla-
 ration.

II. If the plea is to be taken as alleging that the defendant had fully administered up to the time of filing the declaration, it is demurrable. If an executor, with notice of action, chooses to make payments of debts of equal degree after action brought, he commits a devastavit. And if it be a devastavit, the plaintiff's right cannot be affected by the payment. It is said that in this case the defendant had not notice of the action being commenced against her in her character of executrix, and some cases have been cited from *Com. Dig. Administration (C.)* to shew that a summons was no notice of action. But those were cases upon original writs and latitats, upon which there was nothing to shew what was the nature of the demand. A writ of summons differs from the process formerly in use in this, that the amount of the demand is specified at the back of the writ, and therefore, although the former process was not considered sufficient notice, this may be so.

III. Supposing the issue to be insensible, the defendant is not entitled to apply to the Court for a repleader, for it is a well-established rule that a repleader cannot be awarded in favour of the person who made the first fault in pleading; *Tidd's Practice* (a), *Jones v. Bodenham* (b), *Webster v. Bannister* (c). Here, if the issue tendered by the replication is insensible, so also is the plea. [*Taunton, J.* I do not think we have any thing to do with the question of repleader. If it had been asked for, we might have considered of it. *Denman, C.J.* The real point is, what is the meaning of the expression, "the exhibiting of the bill of the plaintiff." The Court are disposed to think that it means the commencement of the suit.]

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Third point:
Issue insensible.

Chilton and Whitcombe, contra. The defendant is not driven to shew that "exhibiting the bill," means the filing of the declaration, for the affirmative of the issue lies upon the plaintiff, who has replied, that at the time of exhibiting the bill the defendant had assets. It is for the plaintiff therefore to affix a definitive meaning to the words. Before the Uniformity of Process Act, "exhibiting the bill" was equivalent to the filing of the declaration. At the trial the plaintiff himself contended for this construction, and insisted that he was entitled to give evidence of assets up to the time of filing the declaration. [*Denman, C.J.* He takes the argument both ways.] It is material to look at the consequences of the plaintiff's having accepted the issue in its present form. If he had replied that the defendant had assets at the time of the commencement of the suit, the defendant might have rejoined, that at the time she had no notice of the action. In *Dyer* (d) it is said, that "if an executor pay a just debt after a writ sued out, and before notice of it, or summons first served, then it is a good plea." *Bro. Abr. Executors*, pl. 43 (e),

(a) 921 in the 9th edition.

(d) 32 a in margin.

(b) 5 Mod. 225.

(e) Translated 11 Vin. Abr. 295.

(c) 1 Dougl. 396, per *Buller, J.*

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is to the same effect. [*Denman, C.J.* I do not see how that is in dispute. There is no doubt that the learned judge is wrong, if the words have the meaning which you ascribe to them.] The time of exhibiting the bill never did mean the commencement of the suit. [*Patteson, J.* There I think you are wrong.] It never meant the suing out of the process. [*Patteson, J.* That is different.] If the words have any meaning at all, they must have a meaning analogous to that which they had before in Courts of Law, which was *filing the declaration*. [*Patteson, J.* Exhibiting the bill never did mean "filing the declaration." The fallacy of your argument lies in considering that it was so. In point of law the bill of Middlesex was sued out against the party as process in another cause, and when he was in custody a bill was filed against him as a prisoner. This was the commencement of the suit.] The exhibiting the bill is rather analogous to the filing of the declaration than to the service of the writ of summons. The bill filed against the party formerly was contemporaneous with the declaration, and when the expression used in this plea and replication was employed, it was intended to relate to *time*.

Perhaps the proper way of considering the words is to treat them as insensible; and if that be so, the verdict cannot stand. The words are altogether insensible, because they have now no technical sense, nor any sense in which ordinary persons can understand them.

It is said that every payment between the commencement of the suit and the declaration would be a devastavit. That would not be so, unless the defendant had notice of the nature of the action. In *Com. Dig. Administration* (C. 2), it is laid down, that "if a suit be commenced by one, an executor may pay another till he has notice of the suit." [*Patteson, J.* Have you found any case where the action was by original, in which such a plea has been put upon the record?] *Corbett's case* (a).

(a) 2 Leon. Case 88, p. 60.

DENMAN, C. J.—This is an action against an executrix, to which she pleads that she had fully administered at the time of exhibiting of the bill, and the issue is, whether she had assets at the time of exhibiting the bill. The defendant at the trial tendered evidence of payments made since the commencement of the action by writ of summons, and before the filing of the declaration. This evidence was objected to, and was rejected by the learned judge. If the words “exhibiting the bill” are understood in one sense, they state a defence; if in another, they do not. If we understand them in the former sense, the rejected evidence was immaterial. I think we must understand the words in the same sense as any ordinary intelligent person would do. Before the act for the uniformity of process, the words meant the commencement of the suit, and that, I think, must be taken to be their meaning now. The evidence therefore being immaterial to the issue, was properly rejected.

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LITLEDALE, J.—I am entirely of the same opinion. Before the Uniformity of Process Act the exhibiting the bill was the commencement of the suit, and when this expression was used in pleading, it was only an informal mode of saying “the commencement of the suit.” Before the act, the words had a definite meaning. Now, it is said, the words are insensible, and the trial which has taken place upon this issue is a nullity. I think that it is not so. We must give effect to the words, if we can do so. They have not that technical meaning which they previously had, but they are words of description of which every one knows the meaning. As no objection was taken by demurrer, we must understand the words in their popular sense. The bill and the declaration were not the same. A declaration presupposed that a bill had been filed. You could not declare against a prisoner until a bill was filed. As the law stood at one time, until altered by statute, the want of a bill might be assigned as error. Whether the

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latitat or the bill was originally the commencement of the suit, is very doubtful. In *Tidd's Practice* (a) it is said, that anciently the first process was a plaint, then an attachment, then a bill of Middlesex, if the defendant resided in that county, and if he did not, a latitat. The origin of all these proceedings is involved in great obscurity. A fiction was subsequently adopted of supposing the defendant in the custody of the marshal, then a bill upon that supposition was filed against him. The bill was therefore then considered as the commencement of the action. Though the language used in the plea is not applicable in the former technical sense of the words, it would be understood by the community at large. No objection has been taken by demurrer. The issue therefore, in my opinion, was well joined, and the verdict must stand.

TAUNTON, J.—This question arises on 2 *Will.* 4, c. 39,—the Act for Uniformity of Process in Personal Actions. The principal object of that act, as appears from the preamble, was to remedy the great variety and multiplicity of process in personal actions in the Superior Courts of Law at Westminster. I shall not enter into the discussion of what the old law was. I agree that it may be clear that payment of other debts after the commencement of the suit is a discharge to the executor if he receives no notice of the demand : but upon the pleadings in this case it is not necessary to consider the question of notice. It does not arise if the words “exhibiting the bill” mean commencement of suit. Since the Uniformity of Process Act there is no such proceeding as exhibiting a bill. The suing out the writ of summons is now the commencement of the suit. The words “exhibiting the bill” are first used by the defendant in her plea in bar, and they must be intended to have been used by her with an appropriate meaning. The only appropriate meaning is, that at the commence-

ment of the suit she had no assets. No injustice is done to the defendant by supposing that she intended to plead a good plea.

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PATTESON, J.—I am entirely of the same opinion. My opinion has fluctuated considerably during the progress of the discussion. I was struck at one time with the argument urged for the defendant, that we should alter the law if we held service of the summons to be notice of the suit. But the question comes to this, whether the words "exhibiting the bill" mean the time of declaring, or the commencement of the suit. These words always did mean the commencement of the suit. By the Statute of Limitations, 21 Jac. 1, certain personal actions are to be commenced within six years. This is the language used, "shall be commenced and sued within the time hereafter expressed." What is the mode of pleading that statute?—That the cause of action did not accrue within six years before the exhibiting of the bill of the said plaintiff against the said defendant. There the words mean the commencement of the suit, whether used by the plaintiff or the defendant. When the defendant uses these words in her plea, she uses them with this meaning. If the plaintiff does not treat them as having the same meaning, that cannot alter the meaning of the words. I therefore quite agree with the rest of the Court in thinking that the evidence was properly rejected.

Rule discharged (a).

(a) An administratrix, who was sued by bill, pleaded that she had no assets die impetrationis brevis originalis; the plaintiff demurred, and had judgment. *Seviniack v. Marshall*, 8 Mod. 388.

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PITT v. COOMBS.—In the matter of CHARLES PITT.

A slight deviation will not deprive a party returning from attendance in a Court of Justice, of his privilege from arrest.

Where a party is arrested under an attachment for contempt of Court in not paying money, he is not entitled to be discharged upon tendering the amount to the officer.

**MR. PITT** in person applied to be discharged from the custody of the sheriff of the county of Middlesex, upon affidavits which contained the following statement. On the preceding Wednesday, *Mr. Pitt*, having succeeded in making a rule absolute in a cause in which he was a party, left the Court of King's Bench, at about six o'clock in the evening, and proceeded immediately to his office in Adam Street, Adelphi, where he took refreshments: having remained there three quarters of an hour he quitted his office, for the purpose of going to his residence in Somers' Town; intending on his way to call at the Rule Office, for the purpose of getting a copy of his rule. Before he had quitted the street in which his office was situated, he was arrested by an officer of the sheriff of Middlesex, upon an attachment for contempt in not paying a sum of money, pursuant to an order issuing out of the Court of Chancery. The officer accompanied him to the Rule Office, where he obtained his rule, and then took him to a lock-up-house in Cursitor Street; whence he was subsequently removed to Whitecross Street Prison. *Mr. Pitt* tendered to the officer arresting him the amount for the non-payment of which the attachment was issued, but the latter refused to accept it, assigning no reason for his refusal. The Court, upon hearing this statement, said, that the matter ought to be inquired into, and that there must be a rule, but refused to make it absolute in the first instance.

Upon affidavits made in answer to the above statement, which alleged that *Mr. Pitt* had left the Court of King's Bench shortly after *five* o'clock, had arrived at his office at about twenty minutes after five, and quitted it at *seven*: that proceeding along Adam Street, he went into the shop of a tailor, upon which the officer (who had been watching him from the time of his entering his office), immediately followed him into the shop and there made the arrest.

*Dampier*, on the following day, shewed cause. A party is protected from arrest only whilst on his way from the Court of Justice to his residence. Here, by the long stay which *Mr. Pitt* made at his office, and more particularly by his deviating from his course by entering the tradesman's shop, he has forfeited his right to this privilege.

With regard to the other point made respecting the tender of the money, it is unnecessary to offer any argument to the Court, as the arrest was upon an attachment for contempt issued out of the Court of Chancery, which could not be purged by payment of money. [*Denman*, C. J. No, there is nothing in that.]

*Mr. Pitt*, in person, supported his rule.

*DENMAN*, C. J.—That doctrine concerning deviation would be very alarming, if allowed to be carried to the extent contended for. Officers ought not to dodge parties so narrowly on their way home from Courts of Justice. Parties ought to be substantially privileged from arrest, whilst returning home from the Court, both for the dignity of the Court and the orderly proceeding of its business. This is a weaker case than that of *Lightfoot v. Cameron* (a).

*LITLEDALE*, J.—There was a case of a man returning to Portsmouth, after attending the Winchester assizes, in which it was held, that a little deviation could not deprive the party of his privilege from arrest.

*TAUNTON*, J. and *PATTESON*, J. concurred.

Rule absolute (b).

(a) 2 W. Bla. 1113.

(b) And see *Luntley v. —*, 1 *Crompt. & Meeson*, 579; where it was held that a practising barrister who is privileged from arrest, *endo, morando, et redeundo*, in his professional attendance at the

Court of Quarter Sessions, did not lose his privilege by going into a picture shop on his way from sessions, although it might have been otherwise if he had stayed in the shop an unreasonable time.

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First point :  
Protection  
from arrest.

Second point :  
Tender to  
officer.

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## WILLIAM THORPE v. EYRE.

In an action between *A.*, tenant of Whiteacre, and *B.* his landlord, all matters in dispute are referred to *C.*, who is to determine what shall be done with respect to the land. *C.* awards, with respect to the land, that from the date of his award the tenancy shall cease, and that *A.* shall within a month deliver up possession to *B.* Possession is taken accordingly. *D.*, a creditor of *A.*, afterwards issues execution against *A.*, and takes the crops growing on Whiteacre.

Held, that this award did not determine the tenancy.

Held also, that the award was admissible in evidence upon the trial of an issue between *B.* and *D.*, upon the question, whether, at the time of the execution, the crops were the property of *A.* or of *B.*

A tenant, whose tenancy is determined after Lady-day, by an agreement which is silent as to way-going crops, is not entitled to such crops under a custom which gives to the tenant such crops upon a regular expiration of a Lady-day tenancy.

Seemle, that the 32d section of 7 Geo. 4, c. 57, as to voluntary preferences by insolvent debtors, does not render a judgment void as against the creditors, unless obtained by collusion with the insolvent.

AN action having been brought by *Eyre* against one *Edward Thorpe* for the amount of his bill of costs as an attorney, *Edward Thorpe* suffered judgment by default, whereupon *Eyre* signed judgment, and on 31st May, 1831, issued a fi. fa. into Bucks. The sheriff received the writ on 6th June, 1831, and soon afterwards seized certain crops of corn, &c. then growing upon land in the parish of Towersay, and other goods. *Edward Thorpe*, on the 22d June, was surrendered to prison by his bail, and in September following took the benefit of the Insolvent Debtors' Act (a). The plaintiff, *William Thorpe*, was appointed assignee. The crops being claimed by *William Thorpe* as his property, the sheriff obtained a rule under the Interpleader Act (b), calling before the Court, the execution creditor and the adverse claimant. The parties having appeared, the Court ordered that an action should be brought, in which *William Thorpe* should be plaintiff, and *Eyre* defendant, in which the two following issues should be raised:—First, whether the crops were, at the time of the execution, the property of *Edward Thorpe* or of *William Thorpe*. Secondly, whether the judgment was void against the creditors of *Edward Thorpe*. In pursuance of this direction of the Court the present action was brought, and came on for trial at the last Bucks Spring assizes, before *Bolland*, B., when the following facts appeared:

(a) 7 Geo. 4, c. 57.

(b) 1 & 2 W. 4, c. 56.

*Edward Thorpe* had been tenant to *William Thorpe*, of lands in the parish of Towersay, for the arrears of the rent

for which a distress was made on behalf of *William Thorpe*. *Edward T.*, considering the distress illegal, brought trespass against *William*. At the same time he also brought an action against *William* for work and labour, and his services as bailiff, which character, and not that of tenant, he alleged that he had latterly held.

Both causes coming on for trial at the Bucks Spring assizes, 1831, they were, by an order of nisi prius, referred to a barrister, who was to direct for what amounts the verdicts should stand, to settle all matters in difference between the parties, and to determine what he should think fit to be done by any of the said parties, respecting the matters in dispute and with respect to the land mentioned in the pleadings in the action of trespass. The arbitrator published his award on the 1st June following, and thereby, after determining upon the other matters referred, found with respect to the land mentioned in the action of trespass, that *Edward T.* held it as tenant to *William*, and awarded that, upon the delivery of his award, the tenancy should cease and determine, and that within one calendar month afterwards, *Edward T.* should give up the possession to *William*. *Edward* quitted the land before the expiration of one month, and *William* entered and took possession of it. The tenancy of *Edward T.* commenced on Lady-day, and by the custom of the country, upon the regular determination of such a tenancy, the tenant is entitled to the crops growing at the time. The issue whether the crops were, at the time of the execution, the property of *William* or of *Edward*, depended mainly upon the effect to be given to this award. It was contended for *William* that the award had put an end to the tenancy on the 1st June, and that, therefore, at the time of the seizure, the crops growing on the land were his property. For *Eyre*, the execution creditor, it was contended, that the award being inter alia, was not evidence upon these issues. The learned baron held that it was admissible, the question being whether the crops were, at the time of the execution, the property of

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*Edward T.*, which question depended upon the award. It was then objected that the award could not of itself operate to determine the tenancy; and that, supposing the tenancy to have been determined by the award, *Edward* was, by the custom of the country, entitled to the way-going crops. Upon this issue the learned baron directed the jury to find a formal verdict for the plaintiff, and gave the defendant leave to move the Court upon the point raised.

Second issue.

Upon the second issue, evidence of the circumstances attending the course of the cause of *Eyre v. Edward Thorpe* was given, with a view to shew that the judgment came within the provisions of the 32d section of the 7 Geo. 4, c. 57 (a), and was therefore void as against *William T.* as assignee of *Edward T.* That action appearing to be brought upon an attorney's bill which had not been delivered a month before action brought, pursuant to the statute, it was contended for the present plaintiff that the judgment was vitiated by the non-delivery of the bill. The learned baron held that this circumstance did not operate to invalidate the judgment, for that the client might well waive the delivery of the bill; but that the fact of a waiver might be a circum-


(a) Which enacts, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over, any estate, real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed

and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner, appointed under this act: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act."

stance to shew collusion. Upon the general point, whether the judgment came within 7 *Geo.* 4, c. 57, sect. 32, the learned baron told the jury that if they thought the proceedings were bonâ fide hostile proceedings, the judgment was good, but that if they were of opinion that the obtaining the judgment was fraudulent and collusive, for the purpose of defeating other creditors, the plaintiff would be entitled to their verdict. The jury immediately returned a verdict for the plaintiff, and in reply to a question put to them by the learned baron, stated that they considered the obtaining the judgment a collusive and fraudulent proceeding.

In the following Easter term, the defendant in person obtained a rule nisi for a new trial upon both issues, the grounds of his motion being, that upon the first issue the learned baron improperly received in evidence the award above mentioned, and that the verdict was against evidence upon the second issue, and that the judge had misdirected the jury upon both issues.

*Biggs Andrews*, and *Gunning*, now shewed cause. The award was admissible in evidence upon both issues. It was receivable upon the first issue, because it affected the title to the possession of the land, and consequently also the title to the crops. It was receivable upon the second issue, because it went to shew the state of the circumstances at the time of the obtaining judgment by default. The effect of the award with reference to the first issue, was to put an end to the tenancy from the date of the award. It was argued, upon *Hunter v. Rice*(a), that the award could not affect the tenancy, because the submission could not operate as a surrender. In that case it was held that certain hay left upon the premises by the tenant was not transferred to the landlord by an award, which directed that it should be delivered up by a certain day; but it does not appear to have been referred to the

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(a) 15 East, 100.

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arbitrator to say specifically what should be done with respect to the hay. It only appears upon the report that the whole of the disputes between the parties were referred to arbitration. Lord *Ellenborough* said, "There is a difference between property awarded to be transferred by the owner to another, and property which is actually transferred by the contract of the owner through the medium of his agent." It may be said here that the tenant has made the arbitrator his agent by the terms of the order of reference, and therefore the property was "actually transferred through the medium of his agent." In *Hunter v. Rice* there is also this other distinguishing circumstance, that the tenant refused to act in obedience to the award; whereas here, at the end of a month, the tenant leaves the property, and the landlord takes possession, which amounts to a delivery of the possession by *Edward T.* In *Doe d. Morris v. Rosser (a)*, it was held that where the lessor of the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the former, the award concluded the defendant from disputing the lessor's title in an action of ejectment. [*Patteson, J.* In that case there was no change of property by the award; the award ascertained only to whom the property in fact belonged; whereas here the arbitrator determines that *Edward T.* was possessed of the land as tenant, and then directs that the tenancy shall cease from the date of his award. Do you find any instance in which an award has been held to transfer property? The award merely determines the tenancy. *Taunton, J.* Suppose *Edward T.* had mown a crop of hay after the date of the award, and had sold it, could *William T.* have brought trover against the vendee? *Patteson, J.* He may enforce the award by attachment.] There is another view of this case: which is, that looking at the award, together with all the circumstances, it amounts to a surrender in law.

(a) 3 East, 15.

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In *Thomas v. Cook* (a), *A.* being tenant from year to year, underlet to *B.*, and the original landlord, with the assent of *A.*, accepted *B.* as his tenant, but there was no surrender in writing of *A.*'s interest. Rent being subsequently in arrear, the landlord distrained on *B.*'s goods; it was held that these circumstances constituted a valid surrender of *A.*'s interest by act and operation of law, within the 29 Car. 2, c. 3, s. 3. *Wells v. Atcheson* (b). The award has been acted upon by both parties. After *Edward T.* had quitted the possession, and it had been taken by *William T.*, the latter could not have maintained against the former an action for use and occupation. So neither can the other party say that he had any right subsequently continuing in him. Therefore, without looking at the direct legal operation of the award itself, it is submitted that all the circumstances taken together amount to a surrender of the lease. The only question, then, is as to the period of the surrender? It must have taken effect from the execution of the award, for the award having been acted upon, *William T.* could not have recovered for use and occupation subsequent to that period.

With respect to the right to emblements, or rather to the way-going crops, it is admitted that the tenant would have been entitled to them, if there had been a regular expiration of a Lady-day tenancy, but here the determination of the tenancy was of a peculiar kind, and does not come within the terms of the custom. It is laid down in the books, that when a tenancy is put an end to by the act of another, or by the act of God, the tenant shall be entitled to emblements; but here the determination is by his own act. He determined the tenancy himself just as much as if he had surrendered it; and in the case of a surrender, there is no doubt but that the tenant would not be entitled to emblements. It is true, here, that the tenancy was actually determined by the arbitrator; but where the books speak of

(a) 2 Barn. & Alders, 119.

(b) 3 Bingham, 462.

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a determination "by the act of another," it is meant of the act of another over whom the tenant has no control. [T<sup>a</sup>unton, J. Emblements and way-going crops stand upon very different ground. Emblements are by common law; the right to way-going crops depends upon custom. Here, it is found that the custom was, that where there is a regular Lady-day tenancy, and it is determined in a regular way, there the tenant shall be entitled to the way-going crops. My impression is, that this is a tenancy not determined in a regular way, but by the act of the arbitrator.]

Second issue.

Upon the second issue, it is apprehended that the direction of the learned baron was perfectly correct. He asked the jury whether they thought that the action was an adverse proceeding, or that the judgment was voluntary. The jury answered that it was voluntary. The judge then put another question—whether the judgment was collusive? to which they answered in the affirmative. This, it is apprehended, would be sufficient to vitiate the judgment even at common law. The question now is, whether there has been a fraudulent transfer or making over of goods within the 32d section of 7 Geo. 4. c. 57 (a). It is submitted that a judgment obtained by collusion, though not mentioned in the clause of the act, is yet within its provisions. The legislature, after using other words of transfer, adds the expression "make over," which seems to have been added for the purpose of comprehending all possible ways of transferring property to a particular creditor. It was said on moving for the rule in this case, that this clause of the act must be construed narrowly, because by another clause (the 48th) which is co-extensive with it, a penalty is imposed. It may be questioned whether the clauses are co-extensive but however this may be, it seems to be a rule that acts for the prevention of fraud, even though they be penal, must be construed liberally. This statute should be beneficially

(a) *Ante*, p. 216.

construed for the interests of creditors. In *Herbert v. Wilcox* (a), it was held that a *payment* by an insolvent to a creditor, within three months before the imprisonment, is void within the 32d section of 7 Geo. 4, c. 57, although the word *pay* is not used in that section. In *Sharpe v. Thomas* (b), it was held that a warrant of attorney to enter up judgment and issue execution, given to a particular creditor by one, who at the time intends to take the benefit of the Insolvent Debtors' Act, is a charge on the property, or a transfer of it by assignment, within the 32d section of 7 Geo. 4, c. 57. In the report of this case in 4 *Moore & Payne*, it appears to have been expressly said by *Tindal*, C. J., that every clause in the act which had for its object the prevention of fraud, must receive a large and liberal construction. [*Denman*, C. J. I think the rule was not granted upon any doubt as to the law upon this part of the case. I was not in Court at the time, but I read over the notes with Mr. Justice *Parke*. *Patteson*, J. The rule was granted upon the grounds that the learned baron did not leave it to the jury to say, whether *Edward T.* was in insolvent circumstances at the time of the signing judgment, and that he did not properly explain to them the meaning of the word "voluntary."] The finding of the jury, that the judgment was obtained collusively, is sufficient. *Tindal*, C. J., in the case already referred to, said, (with reference to the question whether the warrant of attorney could be considered a charge within the words of the clause) "If taken abstractedly, and by itself, perhaps it could not; but where two parties collude together for the purpose of defeating one of the main objects of the statute, it ought not to avail them; and the Court are authorized in looking at the intents of the parties at the time the instrument was executed." That which the parties cannot do directly, the Court will not suffer them to do indirectly. The question

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(a) 6 Bingh. 203; 3 *Moore & Payne*, 515.

(b) 6 Bingh. 416; 4 *Moore & Payne*, 87.

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upon this issue was for the jury. It was left to them, and they have found the judgment voluntary, collusive, and void.

First issue.

The defendant, in person, contra. The award was not admissible in evidence between the parties to this action; *Phillips on Evidence*, 331. The learned judge said, that upon general principles it was not admissible, but admitted it here, because this was an inquiry to inform the Court to whom the property belonged. The inquiry should be according to the legal rules of evidence; *Rex v. Cheadle* (a). All the cases establish that an award binds only parties and privies.

But supposing the award to be admissible, it clearly could not operate to put an end to the tenancy.

Neither was there any surrender by act and operation of law. *Edward T.* was in prison at the time when *William T.* retook the possession.

The property was bound from the teste of the writ, which was previous to the date of the award (b); *Payne v. Drewe* (c).

The tenant was entitled to the emblements; *Bulwer v. Bulwer* (d), *Davis v. Eyton* (e). The tenancy was not determined by *Edward T.*; *Hunter v. Rice* (f); 1 *Roll's Abridgment*, 726. At Lady-day the right to emblements vested in him.

Second issue.

The direction of the learned judge upon the second issue; it is submitted, was wrong. He stated to the jury that if

(a) 3 Barn. & Adol. 833.

(b) Anon. Cro. Eliz. 174. That was a case before the Statute of Frauds, (25 Car. 2, cap. 3, s. 16,) which enacts, "That no writ of fieri facias, or other writ of execution, shall bind the property of the goods against whom such execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or co-

roner, to be executed." The king not being named, is not within this enactment. Extents, and other prerogative powers, therefore, still bind from the teste. See Mann. Exch. Practice, Revenue Branch, 2d edit. 35, 39 (y).

(c) 4 East, 523.

(d) 2 Barn. & Alders. 470.

(e) 7 Bingh. 154.

(f) 15 East, 100.

the judgment were a voluntary proceeding, it was within the meaning of the 32d section of the act. His lordship told them, at the same time, that the defendant had an honest claim. If that were so, surely every regular proceeding at law must be considered as adverse. A judgment is not a charge upon the property within the meaning of the 32d section of the act; *Sugden's Vendors and Purchasers*, 449. This clause requires a very strict construction. If the Court should think this judgment to be a transfer within the 32d section, the insolvent will, under the 48th section, be liable to a penalty, by imprisonment for three years. It has been held by the Insolvent Debtors' Court, that every case of fraudulent preference is within the 48th section. Suffering a judgment and issuing execution are not the acts of parties, but they are considered as acts of the Court, done invitum; *Doe d. Wigan v. Jones* (a).

The verdict was against the evidence, fraud having been in fact presumed, whereas the presumption should have been against fraud.

*Cur. adv. vult.*

DENMAN, C. J., in the course of the term, delivered the judgment of the Court.

After shortly stating the pleadings and the facts, his lordship proceeded :—

The verdict was for the plaintiff on both issues ; finding that the goods did not belong to *Edward T.*, and that the judgment and execution were void as against the plaintiff.

The defendant moved for a new trial, complaining that the verdict was against evidence on the latter issue, and that an award between the two *Thorpes* was improperly received in evidence against this defendant, and that the verdict proceeded on a misdirection as to the law on both.

Whether the property belonged to the plaintiff or to *Edward T.*, mainly depended on the effect to be given to

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(a) 10 Barn. & Cressw. 459.



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the award made in an action between *Edward T.* and the plaintiff. *Edward T.* had held a farm, the property of the plaintiff, as a Lady-day tenant, in a country where the custom of way-going crops prevailed, on the regular expiration of a Lady-day tenancy.

We have no doubt that the award was admissible in evidence; and we think the custom had no operation in the case of a tenancy so determined.

The award made on the 1st of June ordered that *Edward T.*'s tenancy should cease at the time of the delivery of the award, but that he should give up the farm a month after that period.

The plaintiff had argued at the trial that the property was changed by the award, and the learned judge appears so to have directed the jury. We think that the award could not of itself change the property (*a*).

The plaintiff at the trial endeavoured to maintain his issue, that the judgment was void, by evidence that it was voluntary within the Insolvent Act. But as that section speaks only of acts done by the *debtor*, we are strongly inclined to think that it cannot apply to a judgment, without clear proof, at least, that the insolvent had acted in collusion with the creditor, in permitting him to obtain the judgment for the purpose of giving him a preference over other creditors; and we collect from defendant's statement, that the learned baron so instructed the jury; but on reading his report, we apprehend that the jury had no sufficient evidence to support their finding.

We therefore think it desirable that both these issues should be submitted to another jury.

Rule absolute for a new trial.

<p>(<i>a</i>) As to the change of property effected by judgments in favour of the party who recovers damages</p>	<p>in respect of an alleged <i>conversion</i> of the property, <i>vide ante</i>, vol. ii. 665, n.</p>
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DOE, on the several demises of ROBERTS and others,
and of LEACH and WICKHAM, v. WHITAKER.

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EJECTMENT for a house, lands, &c. in Bampton, in the county of Oxford. The declaration contained two demises: the first by *Roberts* and others, and the other, in respect of different premises, by *William Henry Whalley* and *James Whalley Wickham*. The defendant appeared and defended in respect of the second demise only. At the trial before *Vaughan, B.*, at the Oxfordshire summer assizes, 1827, a verdict was taken for the plaintiff, subject to leave given to move this Court upon several objections then made to the plaintiff's title, the jury finding that the mansion-house &c. were part of a copyhold called Hanks's, and that the house of *William Higgins* (called the New Inn) at Bampton is situate out of the manor of Bampton Deanery. Upon motion made to this Court accordingly and by consent, it was ordered that a case should be stated for the opinion of this Court on such points as might embrace the several objections raised. That part of the case which it is material here to state is in substance as follows (a):

It is no objection to a copyhold grant that it is made upon the surrender of a former grantee in remainder, whose admittance had, upon such former grant, been expressly respited, and of whose admittance at any subsequent time there was no entry in the court rolls.

(a) The above statement, though case, was intended to be, and was not in form a part of the special during the argument treated as such. Nor is it an objection that two heriots are expressed to be reserved, where in former grants only one heriot has been reserved. which is reserved out of each tenement, it appearing that former entire grants of the same several tenements have contained similar entire reservations.

Nor is it an objection that two heriots are expressed to be reserved, where in former grants only one heriot has been reserved.

A customary court cannot be held out of the manor unless there be a custom to warrant it; and if a court be so held, all that is done at it is void. But the nullity of such court only affects such things as are *required* to be done *at a court*.

A lord may grant to and admit a copyhold tenant, not only out of court, but also out of the manor.

A grant by the lord in person is good, although it purport to be made at a court within the manor, which in fact was held out of the manor.

The steward of a manor may take a surrender out of court.

But a steward cannot admit out of court.

But a voluntary grant of a copyhold, made by the steward at a court held off the manor, is sufficient where such steward is also clothed with a power of attorney, which expressly authorizes him to make voluntary grants.

So, although the grant purport to be made by such steward *as steward*, and without any reference being made in the grant to the special authority.

In order to constitute the grantee of a copyhold a perfect customary tenant, where the grant is made out of court, such grant must be notified at the next customary court, or at such other subsequent court as the custom points out, and must be entered on the rolls of the court.

But it is sufficient if, having been entered on the court rolls at a void court as at a good court, it appears on the court rolls at a subsequent good court, and be not then objected to by the tenants.

Nor is it an objection to the grant of several customary tenements by one copy of court roll, that several rents are reserved, without specifying

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The premises are copyhold, demisable for two lives and a widowhood, by copy of court roll of the manor of Bampton Deanery, which belongs to the Dean and Chapter of the cathedral church of St. Peter's, Exeter, in fee.

30th October, 1771. At a court baron (*a*), held before the steward of the then lords farmers, to whom the manor had been demised by the Dean and Chapter, a grant for two lives was made of the two messuages, &c. parcels of the customary tenements of the manor, to certain persons, yielding and paying therefore yearly to the lords farmers 26s. 4d. and 7s., and all burthens, customs and services, and a *heriot* (*b*) when it shall happen.

15th October, 1812. At a court baron, a similar grant was made to *William Roberts* and *John Francis*, reserving the same rents and a *heriot* when it should happen; and at the conclusion of the entry on the roll it was stated that *John Roberts* was admitted tenant, but that the admission of *John Francis* was respited until &c.

25th September, 1823. Certain persons, to whom the Dean and Chapter had demised the manor for a term of years, as lords for the time being, lessees and farmers of the manor, joined in appointing *Charles Leake* steward of the manor, by a grant, the material parts of which are as follows:—"We have made and appointed, and by these presents do make and appoint, *Charles Leake* steward of the said manor and the members thereof, with full power and authority unto and for him from time to time to hold courts baron or customary courts for the same manor and its members, and to do all acts usual and customary to be done by stewards in relation thereunto, accounting from time to time for such fines, *heriots*, reliefs, forfeitures, amerciements, and other manorial profits, as shall be received by him or by his deputy or deputies, and which shall not have been ordinarily retained by the stew-

(*a*) Rather a *customary* court, which is held before the steward for the transmission of customary estates, and for deciding all ques-

tions relating to the title to such estates.

(*b*) *Ante*, vol. ii. 798, n.

ards for the time being of the said manor: And we do hereby more especially authorize and empower the said *Charles Leake* from time to time to make any voluntary grant or grants of all or any copyhold lands or customary tenements within or holden, or parcel of the said manor, and to give a licence or licences to demise or otherwise, as he the said *Charles Leake* shall think fit, and either in or out of court as fully as we might or could do; and also to appoint a deputy steward or deputy stewards of or for the said manor and members thereof, with full power to hold all or any such court or courts as aforesaid, or to do such other act or acts as he the said *Charles Leake* could or might do as chief steward of the same manor, and also to depute any person or persons to act under him as sub-deputy steward or stewards of the said manor, as occasion may require: And we do hereby ratify and confirm all and whatsoever the said *Charles Leake* or such deputy or deputies, sub-deputy or sub-deputies, shall lawfully do or cause to be done in the premises by virtue of these presents only."

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24th July, 1824. At a court baron then held before *Charles Leake*, gent. steward, a copyhold grant of the premises in question was made to *William Hanbury Jones* and *John Roberts*, in remainder, after the death of *John Francis*, the surviving tenant under the grant of 1812. This grant reserved the same rents of 26s. 4d. and 7s., and all burthens, customs and services, and a *heriot* when it should happen.

2d May, 1825. By copy of court roll of this date, it appeared that at the court baron (a) of the lords farmers, holden at the house of *W. Higgins*, at Bampton, within the manor aforesaid, the 2d day of May, 1825, before *Charles Leake*, gent. steward,—the homage, viz. Mr. *E. B.*, Mr. *R. D.*, Mr. *R. W.*, sworn,—there came to the court *John Francis*, *William Hanbury Jones* and *John Roberts*, customary tenants of the manor, and in open court surren-

(a) Meaning at a customary court held at the same time with the court baron.

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dered into the hands of the lords farmers, by the acceptance of their said steward, by the rod, according to the custom of the manor, one messuage &c., parcel of the customary tenements of the manor, and one other messuage &c., other parcel &c., together with all appurtenants and all the estate and interest of them the said *John Francis, William Hanbury Jones* and *John Roberts*, of and in the same; To the intent that the lords farmers might regrant all and singular the said messuages &c. to *William Henry Leach* and *James Whalley Wickham* (the lessors in the second demise in this ejectment): Habendum to said *W. H. L.* and *J. W. W.* for the term of their natural lives and the life of the longest liver of them successively, at the will of the lord, according to the custom of the manor: To which said *W. H. L.* and *J. W. W.* the lords farmers of the said manor, by their said steward, granted seisin by the rod, to have and to hold the aforesaid messuages &c. for the term of their natural lives &c. at the will of the lords, according to the custom of the manor, by and under the yearly rents of 26s. 4d. and 7s., payable by even and equal portions, at &c., and all burthens, customs, and services, theretofore due and of right accustomed, and a heriot (*a*) for *each* of the said tenements when it shall happen, according to the custom of the manor: And for such estate so to be had in the premises the said *W. H. L.* and *J. W. W.* have given to the lords-farmers 5s., and are admitted tenants, but their fealty is respited until," &c.

The question for the opinion of the Court, upon this state of facts, is, whether the plaintiff, upon the demise of *William Henry Whalley* and *James Whalley Wickham*, is entitled to recover the possession of the premises mentioned in that demise.

The special case then stated four points as having been settled and agreed upon as embracing the objections reserved at the trial. Of these points only the fourth was discussed and decided upon. It was as follows:

(*a*) *Ante*, vol. ii. 798, n.

Fourth, That the grant of the 2d May, 1825, was void—

First, Because it was made on the surrender of *John Francis*, the surviving life in the copy of the 15th October, 1812, and the grantees in reversion, and it was not shewn that *John Francis* was admitted the lord's tenant, although his admission was expressly reserved by the grant of the 15th October, 1812.

Secondly, Because the grant was voluntary, and *no authority* was shewn in the *steward* of the manor to make such a grant.

Thirdly, Because the *court was held out of the manor* (a), though expressly alleged in the grant to be held within it.

Fourthly, Because two rents are reserved without distinguishing the particular tenements liable thereto respectively; and because a *heriot for each tenement* was reserved by this grant, whereas *one heriot* only was reserved by the grants of the 30th October, 1771; 15th October, 1812; and 24th July, 1824.

The case was most fully and elaborately argued in Easter term, 1833, by *Preston* for the plaintiff, contending that the several objections to the validity of the grant of 1825 were not maintainable, and by *Scriven*, Serjt., for the defendant, supporting the objections. The several questions raised, and the authorities cited, are however so fully discussed in the judgment of the Court, that it is considered to be unnecessary to insert any report of the arguments.

The Court took time to consider; and in this term the judgment of the Court was delivered by

DENMAN, C. J., who, after stating the case, proceeded as follows:—

The question to be considered is, whether the verdict can

(a) It had been found by the jury (*vide ante*, 225), though it is not stated, according to the usual course, in the body of the special

case, that the place at which the grant was made, viz. Higgins's house at Bampton, was *not* within the manor.

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be sustained on the demise of *William Henry Leach* and *James Whalley Wickham*, who were admitted as customary tenants of the premises in question, on the 2d May, 1823.

Four objections were made to their title, but three of these have been abandoned.

The fourth objection, which is, that the grant of the 2d May, 1825, was void, resolves itself into four branches.—It is said to be void—

First, Because it was made on the surrender of *John Francis*, the surviving life in the copy of the 15th October, 1812, and the grantees in reversion; and it was not shewn that *John Francis* was admitted the lord's tenant, although his admission was expressly reserved by the grant of the 15th October, 1812.

Secondly, Because the grant was voluntary, and no authority was shewn in the steward of the manor to make such a grant.

Thirdly, Because the court was held out of the manor, though expressly alleged in the grant to be held within it.

Fourthly, Because two rents are reserved without distinguishing the particular tenements liable thereto respectively; and because a heriot for each tenement was reserved by this grant, whereas one heriot only was reserved by the grants of the 30th October, 1776; 15th October, 1812; and 24th July, 1824.

First point:
 Non-admit-
 tance of
 Francis.

As to the first of these objections, we are of opinion that there was no necessity for a formal entry of the admission of *John Francis*.

Roe d. Cosh v. Loveless (a) is not exactly in point; yet the principles there laid down will be found applicable to this question. That was an ejectment for copyhold premises. The plaintiff in support of his case produced a copy of the court roll, dated the 13th June, 1789, by which it appeared that *Richard Kiddle* and *Sarah* his wife took of the lord the reversion or remainder of and in the premises therein described as being then in the tenure of *Kiddle* and

(a) 2 Barn. & Alders. 435.

endum to *James Cosh*, aged nineteen years, for the
 his natural life, at the will of the lord, according to
 m of the manor, immediately after the death, sur-
 forfeiture of *Kiddle* and wife, by yearly rent &c.
Kiddle and *S. Kiddle* gave to the lord for a fine
 and it is granted in form aforesaid. The plaintiff
 ed the death of *Kiddle* and wife. It was objected
 admission of *Cosh* ought to have been proved to
 the legal title. The judge directed the jury to find
 plaintiff, reserving liberty to the defendant to move
 a nonsuit. In giving judgment upon this case,
 J.J., says, that by the general law of copyholds the
 a right to insist that the tenant shall come in to be
 , and do fealty and homage," and after some other
 ons, he goes on: "but where the lord makes an
 grant, no admittance to a copyhold conformable to
 m of the manor seems necessary, except in cases
 s to those where livery of seisin would be requi-
 e grant of a freehold." And without more parti-
 oticing the opinion of the other judges, we think
 iples upon which that case was determined war-
 1 saying that there was no necessity for *Francis* to
 ted.

the objection that two rents are reserved without
 shing how much is payable for each tenement, we
 at no ground of objection. The rents are the
 those reserved in the year 1771, and no distinct
 is stated to the rents being so reserved, and we
 tend but that they may always have been so.

with regard to the heriots, a heriot for each tene-
 reserved when it shall happen; if the circumstances
 occur that a heriot is demandable for each tene-
 the claim cannot be enforced, but it does not
 grant void.

. By reason of sever-
 be heriotable tenement
 of several heriots in the

lord, during such severance. *Vide*
ante, vol. ii. 798, n.

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Fourth point :
 Confusion of
 rents.

Heriots.

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Second and
third points :
Voluntary
grant by stew-
ard at court
extra mane-
rium.

Third point :
Court held out
of manor.

The principal objection is, that the grant of the premises in question was made at a court held before the steward out of the manor.

And it is contended that any court held out of the manor is a void court, and that all the proceedings at it are all void also ; and that even if it were not a void court, or if the *lord* himself could grant out of the manor, independently of the court, still the *steward* could not do so.

The first question then is, whether a copyhold court can be held out of the manor.

It seems to be quite clear that a court baron of freeholders cannot be held out of the manor.

In *Co. Litt.* 58 a (a), it is said, if a court baron be held out of the manor, it is void : and Lord *Coke* afterwards states what he means by the court baron. "The court baron must be holden in some part of that which is within the manor, for if it be holden out of the manor it is void, unless a lord, being seised of two or more manors, hath usually time out of mind kept at one of his manors, courts for all his said manors by custom. Such courts are sufficient in law, albeit they be not holden within the several manors. And it is to be understood this court is of two natures. The first is by common law, and is called a court baron." And then he goes on to explain the nature of that court. "The second is a customary court, which doth concern copyholders." And that also he further explains.

In *Clifton* and *Molyneux's* case (b), it was resolved "that if a court be held by the steward of a manor out of it, and divers grants and admittances there made, the court and all grants and admittances are void ; for the court of the manor ought to be held within the manor and not out of the jurisdiction of it : which agrees with the resolution of the fourth point before in *Melwich's* case (c). But it was resolved that by custom the court may be held out of the manor, and grants and admittances made there good enough, as

(a) 1 Tho. Co. Litt. 659.

(b) 4 Co. Rep. 27.

(c) *Melwich v. Luther*, Cro. El. 102 ; 4 Co. Rep. 26 b.

bbots, priors, &c., used to hold courts at one or divers several manors, and good by custom." Fourth resolution in *Melwich's* case, which Lord sanctions, is, "that the lord himself may make a admittance of a copyhold out of the manor in ce he pleases; but the steward of the court of a annot, at any court held out of a manor, make admittances." The case of *Melwich* is reported *Eliz.* (a), and the matter seems to have been com- b, and it is again mentioned in *Bright v. Forth* (b), here mentioned as a strange judgment; but the *Cro. Eliz.* appears rather to have been upon the ance of the freehold of the copyholds being divided, rest of the manor, and of the effect which that ave upon the copyholds. In *Sands v. Drury* (c), id that it had been adjudged in the time of Queen the case of the *Duke of Suffolk*, that where one manors and granted a copyhold of the one manor urt of the other manor, it was a void grant; for it e a copyhold according to the custom of a manor it is not a parcel. But *Gawdy* doubted thereof, sidered it would have been well enough if it had used from time whereof &c., but that was not and therefore no title in the defendant. But in *acre's* case (d), it was held that a customary court held out of the precinct of the manor, for no pleas en; which was agreed per totam curiam. But this the point in discussion, which was as to the ap- nt of a steward. The reason also there given does a to be a good one, for the holding of pleas is not reason why the court should be held within the And in fact the court does hold pleas of land— levied and recoveries suffered (e), in the copyholders'

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, *Melwich v. Luther*.
Eliz. 442.
Eliz. 814.

(d) 1 Leon. 286.

(e) So also in all real actions
 for the recovery of the copyhold
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court. It would be attended with the greatest inconvenience if suitors were compelled to go a great distance to attend the court; and if proclamations were made affecting the copyhold tenants, they would not be presumed to know of them if they were made off the manor.

We do not enter into any consideration of the cases where the freehold of the copyholds has been severed from the manor. A good deal of uncertainty seems to prevail as to them, and whether courts may be held off the manor for the admittance of the copyhold tenants.

This question has engaged the attention of Chief Baron *Gilbert*. In his *Treaties on Tenures* (a), he says, "A lord may make a grant or admittance of a copyhold out of the manor at what place he pleases; but the steward cannot, at a court held off the manor, make any grants or admittances. And in *Coke's First Institute*, 58 a (b), he says that a court baron cannot be held off the manor unless the lord hath two or three manors, and hath usually kept court at one for all; which plainly shews that a lord cannot make admittances or grants at a court held off the manor, no more than the steward. For *Coke* says, that if the court baron be held off the manor it is void; and he there speaks of a court baron as including the copyholders' court, where the steward is judge. But, as hath been said before, a lord may make admittances or grants out of the manor at what place he pleases, which are *Coke's* words, and must be understood not at a court, but at some other time, or else he contradicts himself. It is held that if the inheritance of copyholds be granted to one, he may hold courts where he will, for it is no longer a court baron; and the lord or his steward may grant copies out of court as well as in court. And as the case is reported by *Croke* the grant was at a court held at another manor. But as *Coke* reports it, though the grant be at another place, yet it is not said to be done at a court. So

(a) *Gilb, Ten.* 250.

(b) *Co. Litt.* 58 a.

where, whether a steward may make grants by copy out of court. But if a steward can, an under-steward cannot." And in page 319, he says, "My Lord Coke says that the lord may make admittances and grants by copy at what place he pleases, but the steward of the manor at any court held off the manor (for out of the court, it is said by him in another place, he may make admittances and grants by copy), cannot make any admittances or grants by copy. This seems to imply that the lord may make, by copy, grants and admittances at a court held off the manor, or else where is the difference between the case of the lord and steward? And in the next case but one it is resolved, that if the steward, at a court held off the manor, make any grants or admittances, they are all void; but he says nothing of the lord. In his comment upon *Littleton*, he says, the court baron must be held upon the manor, else it will be void. As *Melwich's* case is reported by *Croke* (a), it is there said; that if the lord grant away the freehold of his copyholds, the grantee may hold courts where he will, to make admittances and grants. If then a grant by copy or admittance should be made at a court held off the manor, though it be a court baron, why should it be void, since a court baron contains in it two courts, one of the freeholders and the other for the copyholders; and since that for the copyholders as to granting copies &c., may be held off the manor, there is no reason that because the court baron is void, that therefore the admittance should be void, for they are as two distinct courts; and the admittance had been good, had the court been only the copyholders' court. And if we look back to the reason of the thing, if an admittance may be made at a place off the manor, why not at a court held off the manor, for it is no judicial act; if it were, surely it must of necessity be done in court, and therefore it was held per tot. cur. that a court to do these things might be held off the manor. It is not distinguished in

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this case between the grant of the lord or steward. *But Coke* is express, that grants by stewards at courts held off the manor are void. *Ideo quære de hoc.*"

Taking the whole of these authorities into consideration, (though there is some want of clearness among them,) we think that a customary court cannot be held out of the manor, unless there be a custom to warrant it; and if a court be so held, all that is done at it is void. But though the court be a void court, that only affects such things as are required to be done at a court; as presentments by the homage, imposing fines and amercements, levying fines, suffering recoveries, and other things. But as to many other things, though they are correctly done at a court, it is not essential they should be so. And amongst these things it has been held, that the lord may grant to, or admit, a copyhold tenant, not only out of court, but also out of the manor. The 4th resolution in *Melwich's case* (a).

It was therefore competent to the lord himself to admit or to make a grant to these persons out of the manor, without any consideration of a court; and if he had gone alone to this house, and these persons had come there, he might have made a grant to and admitted them, and might have delivered seisin by the rod, and thus have completed two of the ingredients towards making them tenants by copy of court roll. But supposing instead of that, either by mistake as to the house not being within the manor, or under other circumstances, twenty or thirty persons had assembled there, one of whom called himself the crier, some others bailiffs, beadles, or officers; and some homagers had assembled about the lord, and the crier had made proclamation to open a court, and had sworn persons to be of the homage, and the lord had given a charge to those persons as the homage, and they had made presentments, and had imposed fines and amercements; and that fines had been levied and recoveries suffered, all which would have been void; and then these

(a) *Melwich v. Luther*, 4 Co. Rep. 26 b.

lessors of the plaintiff had offered themselves to receive a grant, and the lord had made and signed a grant and admitted them, and had delivered seisin by the rod, the question is, whether all this machinery of a void court would have invalidated the grant, or whether it would have been mere surplusage, and the grant and seisin remained valid. We are of opinion, that as these are effectual words of grant, and an actual seisin has been delivered, all this statement about the court is only to be considered as surplusage, and that the grant and livery of seisin would be effectual. Thus, therefore, it would be, if the lord himself had made the grant.

But the grant itself, or admittance, not being made by the lord in person, it is necessary to consider whether it was made by an authorized person, and the first question upon that is, whether the steward of a manor can admit out of the manor. It should seem that he may take a surrender out of the manor; *Howsego v. Wild* (a). And so it would appear by *Dudfield v. Andrews* (b). It is so taken in *Tukely v. Hawkins* (c), and the Court say, that a custom to the contrary would be void. That is perhaps going a good way, for in *Dudfield v. Andrews*, it is only by reasoning and query that it is thought proper that the steward should have such a power. But as to an admittance out of the manor, *Tukely v. Hawkins* is express, that the steward cannot admit out of the manor. And the 4th resolution in *Melwich's case* (d), and *Clifton v. Molyneux* (e), are to the same effect, though in these cases it is said that the steward cannot admit at a court held out of the manor. *Watkins*, in his *Treatise on Copyholds* (f), seems to incline to the opinion that a steward may admit out of the manor; but it is only by putting queries and reasoning that he supports that opinion. We are of opinion that a steward cannot, in his mere character of steward, admit out of the manor.

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Second point:
Authority of
steward to
make voluntary grant out
of court.

(a) 1 Roll. Abr. 500; 6 Vin. Abr. Copyhold, X. p. 23.

(b) 1 Salk. 181.

(c) 1 Lord Raym. 76.

(d) 4 Co. Rep. 26 b.

(e) Ibid. 27 a.

(f) 1 Watk. Cop. 253.

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But in the present case, *Leake*, who made the grant, derived his authority from the deed of the 25th September, 1833, by which the lessees of the manor appoint him steward, and besides giving him the usual powers and authorities to hold courts, and to do all acts usual and customary to be done by stewards, they more especially authorized and empowered him, from time to time, to make any voluntary grant or grants of all or any customary or copyhold lands or tenements within or parcel of the said manor, and to give a licence or licences to admit, or otherwise, as *Leake* should think fit, and either in or out of court, as fully as they might or could do. And though from one part of the instrument it seems doubtful whether the powers conferred upon *Leake* are not merely an enlarged explanation of what his duties are as mere steward, yet upon the whole of the instrument, we think it amounts to putting *Leake* in the capacity of attorney, to represent the lord as to surrenders, grants, and admittances, and that whatever the lord might do, *Leake* might do also, and that he therefore might take the surrender and make the grant in question off the manor. But it may be said that *Leake*, in the document, does not profess to act as the general attorney of the lord, but only as steward, and that as steward alone he could not make the grant. *Leake*, however, had the authority, and as in common parlance that person would be called steward who generally represents the lord as to copyhold matters, we think the calling himself steward is sufficient, and that it was not necessary that he should say that he acted as the *general attorney* of the lord.

But besides making the grant or admittance, and livery of seisin, it is necessary, in order to make the person tenant by copy of court roll, that the admission should be notified for the information of the tenants at the next court, or some other court, according as the custom of the manor may be, and an entry of it should be made either by a certificate of the lord or the steward, or presentment by the homage. None of these have been done, but then the proceedings at

this supposed court are entered by the steward in the court rolls, as if done at court; and therefore at the following court after the admittance (a), the tenants have information of what has been done, through an incorrect medium, but we think it sufficient.

An objection may be taken, that nothing done at this supposed court should be allowed to have any effect, as it has a tendency to create a custom to hold a court out of the manor; but if such a course were adopted again, it is probable the tenants would object to it. The holding of this supposed court could be no evidence of such a custom, because if the court rolls were produced, it would appear that the court was held within the manor. Besides, even if it had a tendency to introduce such a custom, we do not think that it could affect the validity of the admittance, supposing it to be otherwise sufficient.

Upon the whole of this case, though this irregular proceeding has brought the parties into considerable difficulties, we think they may be got over, and that the plaintiff, as lessee under the last demise in the declaration, is entitled to judgment.

Postea to the plaintiff.

(a) In his argument, Mr. Serjt. ~~Arden~~ relied much on the fact that no court had been held in the manor, between the time of holding the void court and the time of bringing the ejectment, and contended that though the grant made

at a void court should be held to be a valid grant, the grantees could have no *legal title* until the grant was entered on the roll of a subsequent good court. The *fact*, however, upon which he relied, is not stated in the special case.

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WYKES v. SHIPTON.

Where a cause is referred to an arbitrator, it is not necessary that he should find for the plaintiff or defendant in the very words of the issue. It is sufficient if he decide substantially the question in dispute.

An award made upon a reference of a cause, and all matters in difference between the parties, is bad if it omit to assess damages upon a judgment of nil dicit upon a new assignment of excess.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, and *pulling down a flue* belonging to the dwelling-house, and *nailing a plate* against the wall of the dwelling-house, across an opening in the wall through which the smoke arising from a fire-place in a room, parcel of the dwelling-house, was accustomed to escape and to pass through and along the said flue, into a chimney then standing and being between the said dwelling-house and another dwelling-house next adjoining. The declaration contained two other counts, describing the injury in more general terms, and a count *de bonis asportatis*. The defendant pleaded, first, the general issue; three pleas justifying the breaking and entering the dwelling-house, the pulling down the plate and the flue; and fifthly, leave and licence. The plaintiff joined issue on the first plea, replied *de injuriâ* to the second, third, and fourth pleas, took issue on the fifth plea, and newly assigned that the defendant tore down another and a different part of the flue belonging to the dwelling-house. The defendant joined issue upon the replications to the second, third, fourth, and fifth pleas, and suffered judgment by nil dicit on the new assignment. The cause came on for trial at the summer assizes, 1833, when, by the consent of the parties, it was referred on the following terms: that a verdict be entered for the plaintiff, damages 100*l.*, costs 40*s.*; and that the said cause, and also a certain indictment against the defendant for an assault, shall be subject to the award of *A. B.*, to whom the causes respectively, and all matters in difference between the said parties, are referred, to order and direct that verdicts shall be entered therein, as he shall think proper; and further to direct what shall be done between the parties to secure the enjoyment of an exit for the smoke to both of them, in the occupation of their respective dwelling-houses, and that the same shall be without reference to

their respective legal rights; and that the defendant shall pay such compensation as the said arbitrator shall think fit to award against him, to the said prosecutor of the said indictment; and that the arbitrator shall order and determine what he shall think fit to be done by either of the said parties respectively, respecting the matters in dispute. The costs of the cause to abide the event of the award, and the costs of the reference, and all other costs, to be in the discretion of the arbitrator. The arbitrator, by his award, found that the plaintiff *had no right to use the flue* communicating with the defendant's premises, as an exit for the smoke from the fire in the plaintiff's shop, (in respect of an obstruction of which use by the plaintiff, the action was brought,) and therefore ordered that the verdict entered for the plaintiff in the cause should be set aside, and a verdict entered for the defendant; and that the defendant should, within three calendar months from the date of the award, pay the plaintiff 10*l.*, as a compensation for the assault; and that each of the parties should pay his costs of the reference, and that the costs of the award should be paid in equal moieties.

In Michaelmas term last, *Channel* obtained a rule nisi to set aside this award, on the grounds that the award did not sufficiently dispose of or put an end and determination to this cause, but at most only disposed of and determined a part of the cause, viz. certain issues in fact raised by the pleadings; and that it did not assess any damages upon, or determine, or in any way adjudicate upon the residue of the cause, viz. the damages to which the plaintiff might be entitled upon the judgment signed and given for the plaintiff upon the new assignment, or the rights of the plaintiff as regards or relates to the judgment; and also because it appears by the award, that the reason why the arbitrator directed a verdict to be entered for the defendant was, that he found and determined that the plaintiff had *no right to use the flue* in the award mentioned, as in the award mentioned, and in respect of an obstruction of which he states

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that the said action was brought; whereas such obstruction was not, as appears by the pleadings, the point in dispute in the cause, or one of the points in dispute, nor a matter the determination or finding whereof in favour of the defendant entitled him to a verdict.

Thesiger now shewed cause. The objection that the finding of the arbitrator is not upon the real point in dispute, cannot be maintained. He has substantially adjudicated upon the matter in dispute. It is not necessary that the arbitrator should in his award use the very terms of the issue raised by the pleadings. [*Deuman*, C. J. The arbitrator has stated the grievance in another mode, which is sufficient.] Then as to the other question, which is in fact this, that the arbitrator has not given the plaintiff nominal damages upon the judgment on the new assignment:—This omission would not affect the costs of the cause. It seems to be settled, that where a defendant withdraws his pleas to a new assignment, and obtains a verdict upon other pleas, that he is entitled to the costs of the trial; *Cross v. Johnson* (a). [*Taunton*, J. There are also the cases of *House v. Treasurer of the Thames Navigation* (b) and *Broadbent v. Shaw* (c). *Patteson*, J. The difficulty I feel is, whether the plaintiff can have his costs taxed on the confession of the new assignment, as no damages are assessed.] The defendant may confess nominal damages. [*Littledale*, J. If this was an application to the discretion of the Court, we might discharge the rule upon the defendant undertaking to make a deduction of these costs.] In an anonymous case in *Smith's Reports* (d), it was held, that where a cause is referred to an arbitrator, and the costs are to abide the event, and the arbitrator awards a specific performance of something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled

(a) 4 Mann. & Ryl. 290; 9
 Barn. & Cressw. 613.

(b) 3 Brod. & Bingh. 117.

(c) 2 Barn. & Adol. 940.

(d) 1 Smith, 426.

to costs, although the arbitrator does not award a verdict to be entered in form.

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Channel, in support of the rule. This is not an application to the discretion of the Court. The award is illegal. The plaintiff will sustain material injury if this award be not set aside, since he will be deprived of the damages upon the new assignment, which would be assessed at the trial. The Court is not in a situation to give judgment. Even if the Court were to give effect to the finding of the issue, the record would be incomplete.

DENMAN, C. J.—The objection is fatal, and we do not find any means of obviating it.

LITLEDALE, J.—The jury who try the issue should assess the damages. The arbitrator being here put in the place of the jury, should therefore have done so. I do not see that the Court can now issue a writ of inquiry (*a*) without the consent of the parties.

TAUNTON, J. concurred.

PATTERSON, J.—I can only arrive at a probable conclusion as to what the arbitrator meant to decide upon this part of the case. It is very unfortunate that we cannot remedy this defect.

Rule absolute (*b*).

(*a*) The reason why the Court could not issue a writ of inquiry to supply an omission by the principal jury is, that the party would be thereby deprived of his writ of attainder. Where therefore no attainder lay, such omission might be supplied by a writ of inquiry; P.

44 E. 3, fo. 7. pl. 3. And see *Cook's case*, 4 Leon. 245, pl. 387; *Godbolt*, 207, pl. 294; *Layton v. Manlove*, 2 Salk. 469; *Clement v. Lewis*, 3 Brod. & Bingh. 297.

(*b*) And see *Norris v. Daniell*, 10 Bingh. 507; *Dibbin v. Marquis of Anglesea*, ib. 568.

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FOSTER v. TAYLOR.

Where a statute contains regulations for the protection of buyers against the fraud of sellers, a seller cannot recover for the price of goods sold in contravention of the regulations, although the statute does not in terms prohibit such a sale, but imposes a penalty upon the seller.

Where, therefore, butter was sold in firkins not branded according to the provisions of acts (36 Geo. 3, c. 86, and 38 Geo. 3, c. 73) "to prevent abuses and frauds in the packing, weight, and sale of butter," which require that makers of vessels for the packing of butter shall brand them with their names under a pecuniary penalty, and that sellers of butter shall, under a further penalty, use vessels so branded, and brand their own names:—It was held that an action for the price could not be maintained.

Secus, in the case of a breach of a mere revenue regulation which is enforced by a penalty.

ASSUMPSIT for goods sold and delivered. This action was brought to recover the price of 15 firkins of butter. At the trial at the Carlisle Spring assizes, 1832, before *Patteson, J.*, the contract for the sale of and the delivery of the butter was proved, but it appeared that some of the firkins contained less than 56 lbs. each, and were none of them branded with the name of the seller. Upon this it was objected, on the part of the defendant, that the terms of the statutes of 36 Geo. 3, cap. 86, and 38 Geo. 3, cap. 73, had not been complied with, and that therefore the contract was void. Under the direction of the learned judge, the jury found a verdict for the plaintiff, but deducted a certain sum on account of the short weight; leave was, however, given to the defendant to move to enter a nonsuit. In Easter term, 1832, *Dundas* obtained a rule nisi accordingly; against which, in Hilary term, 1833,

Courtenay and *Blackburn* shewed cause. The mere circumstance of the acts of parliament requiring certain things to be done, and imposing penalties in case of non-compliance, does not vitiate the contract. *Law v. Hodgson*(a) will be relied on by the other side. That was an action to recover the value of a quantity of bricks, and an objection was taken that the bricks were not of the dimensions required by the 17 Geo. 3, cap. 42. It was held that the seller could not recover. That case is open to objections. The Court had no right to extend the operation of a penal act to cases not specifically within its provisions. But assuming that case to be good law, there is a material distinction between the provisions of 17 Geo. 3, and those

(a) 11 East, 300.

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contained in the statute upon which this question arises. In 17 Geo. 3 there was nothing from which it could be inferred that it was the intention of the legislature that the contract should remain in force; whereas by the 6th section of 36 Geo. 3, the continuance of the contract is plainly implied, notwithstanding that a penalty is incurred for breach of the provisions of the act. That section enacts, that every person who shall sell less than the full quantity thereby appointed, shall be liable to an action on the case for recovery of satisfaction. This section would have been unnecessary if it was the intention that the seller should not, in such case, recover upon his contract. If the deficiency of weight does not vitiate the contract, a fortiori the omission to brand the firkins with the name of the seller will not have that effect. In *Law v. Hodgson* a fraud was committed by one of the contracting parties upon the other; the buyer had not what he contracted for. Here, the omission to brand the firkins was no fraud on the defendant. In *Wetherell v. Jones (a)*, an action was allowed to be maintained for the recovery of the value of certain spirituous liquors, although their strength was not according to the provisions of 6 Geo. 4, cap. 80, and although the invoice delivered with them to the purchasers did not state their true strength. Lord *Tenterden*, in giving judgment, said, "Where the consideration and the matter to be performed are both legal, we are not aware that the plaintiff has ever been precluded from recovering by an infringement of the law not contemplated by the contract, in the performance of something to be done on his part." The same doctrine was recognized in *Johnson v. Hudson (b)*. All that has taken place here amounts only to a breach of certain regulations of an act of parliament, and is no fraud upon the parties. There are a great variety of regulations scattered throughout the two statutes, and enforced by particular penalties. Many of these regulations are extremely minute. Can it be said that because a penalty has been

(a) 3 Barn. & Adol, 221.

(b) 11 East, 180.

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incurred by the breach of one of these minute regulations, the seller shall be deprived of his right to recover for the goods which he has sold? If that were so, each of these circumstances might be *separately* set up as a defence to an action on a contract for the sale of butter, and the vendor might be taken by surprise at the trial. The penalties imposed for the breach of the different provisions of the acts, are of themselves sufficient punishment. *Tyson v. Thomas(a)*, in which the Court held that a contract for the sale of corn by the *hobbett*, contrary to the provisions of the 22 Car. 2, c. 8, and 22 & 23 Car. 2, c. 12, could not be enforced, may be relied on for the defendant; but upon that case, it is to be observed that the statute 22 & 23 Car. 2, c. 12, adds to the penalty imposed by the former act, a forfeiture of the corn, &c. bought or sold contrary to the act.

Aglionby and *Dundas*, in support of the rule. The case falls within *Law v. Hodgson*. The statute 17 Geo. 3, c. 42, mentioned in *Law v. Hodgson*, as in this case, imposed a variety of regulations, and it might have been contended in that case, that it could not be the intention of the legislature to make the contract void upon a non-compliance with any one of such a variety of minute regulations. It may be considered that the making the contract void is in the nature of an additional punishment, to be inferred from the words of the act. The language of the statute 17 Geo. 3, c. 42, is similar to that of the act now in question, it appearing in both that the object of the legislature was to protect the public from frauds. A contract made in contravention of an act of parliament passed for public purposes, and for the public benefit, cannot be enforced in a Court of Law. *Tyson v. Thomas*, *Langton v. Hughes(b)*, *Biggs v. Lawrence(c)*, *Waymell v. Read(d)*, *Clugas v. Penaluna(e)*. In *Bartlett v. Finer(f)*, it was said by Lord Holt, that every

(a) 1 McClelland & Young, 119.

(b) 1 Maule & Selw. 593.

(c) 3 T. R. 454.

(d) 5 T. R. 599.

(e) 4 T. R. 466.

(f) Carthew, 252.

contract made about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibiting words in the statute; *Parkin v. Dick*(a). The distinction which runs through all the cases, from the time of Lord Holt down to the case of *Law v. Hodgson*, is, that if the question arises upon a statute enforcing excise or revenue regulations by a penalty, the penalty only is incurred, and the contract is not void; but when the act is made for the benefit and protection of the public, the contract made in contravention of it is entirely void. There are many other cases in which, although the act speaks only of a penalty, the Court have declared the contract void. In *Bensley v. Bignold*(b), which was an action brought by a printer for work done, it was held that he could not recover, because he had neglected to affix his name, pursuant to the statute of 39 Geo. 3, c. 79, s. 27, which imposes a penalty of 20*l.* in case of disobedience to its provisions. Bayley, J., there says, "Where a provision is made for public purposes, I think it makes no difference whether the thing be prohibited absolutely, or only under a penalty. The public have an interest that the thing shall not be, and the objection in this case must prevail, not for the sake of the defendant, but for the public." *Marchant v. Evans*(c); *Little v. Poole*(d); *Cannon v. Bryce*(e). *Brown and others v. Duncan*(f), in which the cases of *Law v. Hodgson* and *Little v. Poole* were recognized, was an action for the recovery of spirits sold by the plaintiffs as distillers; and it was held that the breach of certain regulations for the protection of the excise, by 4 Geo. 4, c. 96, and 6 Geo. 4, c. 81, did not deprive the vendors of their right of action. Lord Ten-

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(a) 11 East, 502.

Barn. & Cressw. 192.

(b) 5 Barn. & Ald. 335.

(c) 3 Barn. & Alders. 179.

(e) 2 B. Moore, 14.

(f) 5 Mann. & Ryl. 114; 10

(d) 5 Mann. & Ryl. 118; 9 Barn. & Cressw. 93.

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tenden, speaking of *Johnson v. Hudson*, and *Hodgson v. Temple* (a), said, "These cases are very different from those where the provisions of acts of parliament have had for their object the protection of the public, such as the acts against stock jobbing and the acts against usury. It is different also from the case where a sale of bricks, required by act of parliament to be of a certain size, was held to be void because they were under that size. There the act of parliament operated as a protection to the public as well as to the revenue, securing to them bricks of particular dimensions. Here the clauses of the act of parliament had not for their object to protect the public, but the revenue only." In *Rex v. Gravesend* (b), which is the latest case in point, *Law v. Hodgson* is recognized as good law. With regard to the 6th clause of 36 Geo. 3, c. 86, it is urged that, by that section, the contract is treated, after penalty incurred, as an existing contract; but the words which are found in it clearly shew that it was meant to relate only to the case of sales by the retail dealers, and not by dairymen, farmers, &c. who are the persons alluded to in the former part of the act. The description of persons included in the provisions of that clause are "cheesemongers, dealers in butter," &c. which words there occur for the first time. The object must have been to extend a protection to persons purchasing from the inferior dealers, and this clause cannot, therefore, be used to explain the meaning of the former section.

Cur. ante. vult.

LITLEDALE, J.(c), in the course of this term, delivered the judgment of the Court,

After stating the facts of the case, his lordship proceeded as follows:

Upon the question of deficiency of weight there could be

(a) 5 Taunt. 181.

(b) 3 Barn. & Adol. 240.

(c) This case was argued in

Hilary term, 1833, when Denman, C. J., was absent by reason of a domestic affliction.

no ground for a nonsuit; because, as to eight of the casks, there was no evidence that they were deficient in weight, and the contract not being for one entire sum for the whole parcel, but at the rate of so much per firkin (*a*), the plaintiff would be entitled to recover for as many firkins as were of full weight.

On the other point, that the casks were not marked according to the directions of the act of parliament, we should be rather disposed to think, on a perusal of the learned judge's notes, that there was scarcely sufficient evidence for the jury to have come to the conclusion they did, but we must take the finding of the jury to be right, as there is no question about a new trial, and the amount of damages is not so large as that it should be granted as upon a verdict against evidence.

The title of the act of 36 Geo. 3, c. 86, is, "An Act to prevent abuses and frauds in the packing, weight, and sale of butter, and to repeal certain acts relating thereto." And the title of the act of 38 Geo. 3, c. 73, is, "An Act for amending and rendering more effectual an act made in the 36th year of the reign of his present Majesty, intituled," &c. (giving the former title.)

The former acts made on this subject are one of 13 and 14 Charles 2, cap. 26, of which the title is "An Act for reforming the abuses committed in the weight and false packing of butter," and another of 4th and 5th Will. & Mary, c. 7, the title of which is "An Act to prevent abuses committed by the traders in butter and cheese."

In these former acts, several of the provisions in the later acts now in force, or nearly similar ones, are introduced, and in some instances much heavier penalties than in the existing act. The attention of parliament has therefore, at an early period, and on several occasions, been directed to prevent frauds and abuses, and for the protection and benefit of the public relative to the sale of butter.

(a) *Ante*, vol. ii. 182, 190.

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The regulations as to marking the casks, in the 2d section of the 36 *Geo. 3*, c. 86, are, "That every cooper or other person making a vessel for packing butter, shall, on the bottom of the vessel, brand his Christian name and surname at length, to denote that it is the mark of the cooper or maker of the vessel, together with the exact weight or tare, or in default, for every such offence shall forfeit ten shillings."

And in the 3d section, "That every dairyman, farmer, seller of butter, or other person who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid and no other, and shall, on the bottom thereof on the inside, and on the top on the inside, brand his Christian name and surname at length, and shall also brand on the top on the outside, and on the bouge or body of the vessel, the true weight or tare of the empty vessel; and shall also brand his Christian name and surname at length on the bouge or body of every vessel, across two different staves at least; and shall also imprint his Christian name and surname upon the top of the butter, upon pain and penalty of forfeiting for every such offence the sum of five pounds."

The 1st section of the 38 *Geo. 3*, c. 73, after reciting, amongst other things, "that the act was much avoided by concealing the places of abode of the coopers making the vessels, and of the dairymen or other packers of the butter," enacts "That every cooper or other person making a vessel, shall, on the bottom of the vessel on the outside, in addition to his Christian name and surname, brand the name of his place of abode or dwelling in the manner directed, or in default shall forfeit and pay the sum of ten shillings."

The 2d section directs, "That every factor or agent who shall buy or sell, or for the purpose of sale have in his custody any vessel containing butter for sale, not made and marked according to the directions of the act, shall forfeit and pay twenty shillings."

It is to be observed, that though the latter act recites that the former act had been evaded by concealing the place of abode of the dairymen and other packers of butter, yet the enacting part leaves them out, and only mentions coopers and other persons making the vessels.

The 36 Geo. 3 contains several provisions as to the weight of the butter in each cask, as to the not mixing one kind of butter with another kind, and the mode of salting the butter, but which are not now the subject of discussion; but the provisions as to marking the names, are made with a view that if the butter be made or put up in a way contrary to the other directions of the act, or be otherwise liable to be complained of, the person who is aggrieved may know where the original fault is committed, and be able to obtain redress.

As the jury have found that the casks were not marked according to the act, it is to be considered what effect that has upon the present action.

In *Bartlett v. Viner* (a), Lord Holt says, that every contract made about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibiting words in the statute. And in the report of the same case, in *Skinner* (b), the Court say that "in every case where a penalty is annexed to the doing of such an act, yet if such a thing appears upon the record to be the consideration, the agreement is void;" and "in every case where the statute inflicts a penalty for doing such an act, though the act be not prohibited, yet the thing is unlawful."

Where acts have been passed containing regulations as to articles which are the subject of sale, and the policy of the act is for the security of the buyers, and to protect them against the frauds of the seller, it has been held that

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(a) Carthew, 252.

(b) Page 343.

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the seller cannot recover the price; and within this rule the present case appears to us to fall. The case of *Law v. Hodgson* at nisi prius (a), and afterwards on a motion for a new trial (b), was decided on this principle. That case was upon the stat. of 17 Geo. 3, c. 42, which, in the 1st section, directs that bricks shall be made of a certain size, and in the 2d section gives a penalty for not doing so; and the bricks which were the subject of the action being under the statuteable size, it was considered to be a fraud on the buyer, whom the legislature meant to protect, and the plaintiff was held not entitled to recover the price.

Tyson v. Thomas (c) was an action for not delivering twenty hobbetts of barley; and it was objected that the action could not be maintained, because the 22 Car. 2, c. 8, s. 2, having enacted that if any person shall buy or sell any corn by any other measure than the Winchester bushel, he shall forfeit forty shillings. And the 22 & 23 Car. 2, c. 12, s. 2, having, besides the former penalty, imposed the further penalty of losing the corn or the value, and as it appeared that the hobbett was an uncertain measure, it was held that it was a sale in a manner prohibited by the statutes of Car. 2, and that the plaintiff could not recover. It must be observed that the selling by customary measure is now authorized by 5 Geo. 4, c. 74, under certain restrictions.

Little v. Poole (d) was an action brought to recover the price of coals. The 47 Geo. 3, c. 68, contains several regulations as to the sale of coals, and it directs the vender to deliver to the purchaser a ticket, which is to contain the number of sacks, the name of the coals sent, the name of the vender, and the name of the labouring meter; and it subjects the vender to a penalty of twenty pounds for not doing so. The ticket did not follow the directions of the act as to the labouring meter; and it was held that as the

(a) 2 Campb. 147.

(b) 11 East, 300.

(c) 1 M'Clel. & Younge, 119.

(d) 5 Mann. & Ryl. 118; 9 Barn. & Cressw. 192.

object of the act was to protect the buyer against the fraud of the seller, the seller was not entitled to recover the price.

These cases more particularly apply to the acts of parliament which are considered as being for the protection of parties to a contract of sale.

There are several other classes of cases where acts of parliament have been infringed in other respects: one of which is *Langton v. Hughes* (a). The plaintiffs were druggists, and sold drugs to the defendants, who were brewers, knowing that they were to be used in brewing beer, which was contrary to the provisions of an act of parliament; and Lord *Ellenborough* there states, that it may be taken as a received rule of law, that whatever is done in contravention of the provisions of an act of parliament cannot be made the subject-matter of an action.

There are other cases where contracts have been made on the Lord's day, which are within the statute of *Car. 2*; others arising out of transactions connected with smuggling; others arising out of publications without the name of the printer being inserted in the document published; others arising out of contracts relating to unlicensed places of public exhibition or resort, which are carried on in a manner not authorized by law; others arising out of disabilities in attorneys and apothecaries, not having the proper certificates to practise; others out of illegal instances;—the names of which cases need not be enumerated;—and the general principle is laid down, that where the provisions of an act of parliament have been infringed, no contract can be supported arising out of it.

There are, however, some cases where the rule has been held not to apply: as in *Johnson v. Hudson* (b), where the plaintiff, a factor, sold tobacco segars, not having entered himself as a dealer in tobacco, nor having a licence, and sent the tobacco without a permit; and it was held that

(a) 1 Maule & Selw. 593.

(b) 11 East, 180.

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the plaintiff might recover the price, as there was no fraud intended, and there was nothing in the act which rendered the contract illegal, and it was only a breach of revenue regulations, protected by a penalty; by which we apprehend it is to be understood that revenue regulations were meant to attach to the plaintiff personally, and affect him with the penalty, in order to secure the licence duty, but in no way to prohibit the contract. It is to be observed also, that the Court intimated that the plaintiff was not to be considered as a dealer in tobacco at all within the meaning of the act.

In *Brown v. Duncan*(a), the five plaintiffs carried on business as distillers. By 6 Geo. 4, c. 81, s. 7, each person who is a distiller ought to be named in the licence; and by another act no person who is a vendor or retailer of spirits ought to be licensed as a distiller within the limited distance. One of the plaintiffs was not named in the licence, and he carried on the business of a retailer of spirits within the limited distance. But, notwithstanding this, the plaintiffs were held entitled to recover the price of the whiskey sold in their trade as distillers, which had been guaranteed by the defendant; for there had been no fraud, on the part of the plaintiffs, on the revenue, though they had not complied with the excise regulations, which it was thought wise to adopt in order to secure, as far as might be, the conduct of the trader in such a way as was deemed most expedient for the benefit of the revenue; and the plaintiff was held entitled to recover. These regulations were considered to be of the same nature as those referred to in the case of *Johnson v. Hudson*, not directly or indirectly prohibitory of the contract on which the action was brought.

In *Wetherell v. Jones*(b), the plaintiff was a rectifier of spirits, and sold spirits to the defendant, who was a confectioner. The spirits were above proof, though described in a permit as being under proof. It was held that the

(a) 5 Mann. & Ryl. 114; 10 Barn. & Cressw. 93. (b) 3 Barn. & Adol. 221.

Geo. 4, c. 80, did not apply to distillers of spirits, and it as there was no provision in the act to regulate the strength of British spirits, the contract was not illegal, nor were the spirits prohibited goods; and it was further held, that the irregularity of the permit, though it arose from the plaintiff's own fault, and was a violation of the law by him, did not deprive him of the right of suing upon the contract, which was in itself perfectly legal, there being no agreement, express or implied, that the law should be violated by such improper dealing. But it was also there held, that where a contract which the plaintiff seeks to enforce is expressly or by implication fraudulent by the statute or common law, no Court will lend its assistance to give it effect. But where the consideration and the matter to be performed were both legal, the Court said they were not aware that the plaintiff had ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part.

The present case does not come within any of the cases so far cited, because here the acts of parliament are made for the protection of the public against frauds, and also the subject-matter of the contract is in such a state, for want of the casks being properly marked, that the sale of it was prohibited by act of parliament. It is necessary, however, to notice one point arising out of this act of parliament, that the penalty is given in the same clause which directs something to be done, and it might therefore be said that something is only directed to be done, subject to a penalty, and not absolutely; and in *Law v. Hodgson (a)*, the case most frequently referred to of late on these subjects, Lord *Denbrough* notices that the penalty is given in a separate clause. In the case of indictments arising out of provisions in acts of parliaments which subject parties to penalties, where the penalty is given in the same clause which enacts

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(a) 2 Campb. 147.

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the offence, it has been held, that if the offence was not one at common law, you cannot have a general indictment for the offence under the act of parliament, and can only proceed for the penalty. In *Rex v. Wright (a)*, which was an indictment against the defendant, and charged that he, being a spiritual person, did take to farm several lands, against the statute of *Hen. 8, c. 13, s. 1*, on an application to quash the indictment, Lord *Mansfield* said he always took it, that where newly created offences were only prohibited by the general protecting clause of an act of parliament, an indictment will lie; but that where there is a particular prohibiting clause, specifying only particular remedies, there such particular clause must be pursued; for otherwise the defendant would be liable to a double prosecution, one upon the general prohibition, and the other upon the particular specific remedy.

The same limited rule however does not seem to have been adopted in civil actions, so as to confine the proceedings against the party offending to the penalty; and we are not aware that the observations of Lord *Ellenborough*, as to the penalty being given by a separate clause, has been noticed at any other time; and indeed, in many of the cases which have occurred, the penalty is given in the same clause.

Upon the whole of this case, we are of opinion that judgment of nonsuit must be entered.

Rule absolute to enter a nonsuit.

(a) 1 Burr. 543.



CROOK v. JADIS (a).

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ASSUMPSIT on a bill of exchange. At the trial before *Denman*, C.J., at the sittings after Michaelmas term, 1833, it appeared that the bill, which had been lost (b), had been discounted by the plaintiff under circumstances somewhat calculated to excite a suspicion that a holder previous to *Howard*, from whom the plaintiff took the bill, had not fairly come by it. It was contended on the part of the defendant that the plaintiff having taken the bill under such circumstances, had not exercised due caution, and was therefore not entitled to recover. The Lord Chief Justice told the jury that if they thought there was no *gross negligence* on the part of the plaintiff in taking the bill under the circumstances detailed in the evidence, their verdict ought to be for the plaintiff. Verdict for the plaintiff.

To an action by an indorsee for value of a bill which has been lost, it is no defence that the bill was taken under circumstances which ought to have excited the suspicion of a prudent and cautious man. Nothing short of *gross negligence* will be an answer.

Sir *J. Scarlett* now moved for a new trial, on the ground of a misdirection. The question which should have been left to the jury was, whether the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent and cautious man. *Down v. Halling* (c), *Gill v. Cubitt* (d).

DENMAN, C. J.—The objection is to my having used the expression “*gross negligence*.” Now I used it very advisedly, and I think that nothing short of gross negligence ought to destroy the holder’s right to recover on the bill. That was the least word, I think, which ought to be used in putting the case to the jury.

LITLEDALE, J.—I certainly concur. The term “*gross negligence*,” was the very least at which it could be put.

- (a) This is the case referred to in *Backhouse v. Harrison*, ante, 188. & Cressw. 330; 1 Carr. & Payne, 11.
 (b) As to proof of loss, vide *Holday v. Sigil*, 2 Car. & Payne, 176. (d) 5 Dowl. & Ryl. 324; 3 Barn. & Cressw. 466; 1 Carr. & Payne, 163, 487.
 (c) 6 Dowl. & Ryl. 455; 4 Barn.

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TAUNTON, J.—The words used were the most appropriate words. I confess I never could understand,—I never could entertain any definite idea of the degree of caution which a prudent and careful man would take.

PATTESON, J.—I think the way in which the question was put to the jury was most accurate. I confess I never could understand what is meant by a man's taking a bill under circumstances which ought to have excited suspicion in the mind of a prudent and cautious man.

Rule refused(a).

(a) Upon other points raised, the Court granted a rule to shew cause why the verdict should not be set aside and a nonsuit entered, or a new trial had. See *Backhouse v. Harrison, ante, 188.*


SADLER v. HICKSON.

A. recovers against B., C., and D., partners in trade, upon their joint contract, and takes in execution B. only, who thereupon pays the whole sum recovered. B. cannot recover in a Court of law against his co-defendants for contribution.

His remedy is in equity, as in cases of a voluntary payment by one partner of a debt due from himself and his copartners upon their joint contract.

ASSUMPSIT for money paid to the use of the defendant. The plaintiff, the defendant, and J. S., had jointly employed a builder to repair a building in which they carried on trade in copartnership. The builder recovered the price of these repairs in an action against the three. An execution having issued, *the whole amount* was levied upon Sadler, who now sued for contribution. At the trial at the last London sittings, before Denman, C. J., the plaintiff produced the record in the former action, from which it appeared that the judgment was against the three defendants, and proved that he alone had been taken in execution, and that he had paid the whole debt. The defence set up was, that the original action having been brought against the three defendants as partners, and the partnership debt paid by one, that partner could not recover contribution against the others, except by a bill in equity. The learned Chief Jus-

tice was of this opinion, and accordingly nonsuited the plaintiff, to whom, however, he gave leave to move to enter a verdict for 100*l*.

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F. Pollock, in the early part of this term, moved accordingly. It is admitted that where one of several partners *voluntarily* pays the whole partnership debt, he cannot recover at law against his copartners for contribution, but it would appear to be otherwise where the whole debt has been paid by one partner under *legal compulsion*. In such a case, it would seem, that it is for the partner who is sued for contribution to go into equity. There is no authority to this effect, but it is the common opinion at the bar that the law is so. *Merryweather v. Nixan* (a) clearly goes to this, that wherever there has been a joint contract and a judgment against the joint contractors, one of whom has been *compelled* to pay the whole debt by process of execution, he may recover against his co-contractors for contribution. Why should the circumstance of the joint contractors being also partners make a difference? It may be that this is the only transaction in which these parties acted in partnership. There is no such thing as a general and universal partnership (b). That which is called a general partnership, is general only in one trade. There seems to be no reason why the rule which applies to individual joint contracts should not apply to partnerships in any particular set of contracts. The plaintiff here was taken in execution, and paid the money to obtain his personal liberty. [*Patteson, J.* referred to the case of *Helme v. Smith* (c).] The debt there was not paid under similar compulsion. The strong point for the plaintiff here is, that he comes into Court with a record, upon the face of which it is manifest that he has been compelled to pay more than his fair proportion.

Cur. adv. vult.

(a) 8 T. R. 186. And see *Cowell v. Edwards*, 2 Bos. & Pul. 268.

(b) Like the *societas omnium bonorum* of the civil law.

(c) 7 Bingh. 708.

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On a subsequent day in the term,

DENMAN, C. J., said—We think there is no ground for making the distinction contended for by Mr. Pollock, therefore there must be no rule.

Rule refused (a).

(a) And see Rastall's Entries, 610; 2 Bos. & Pull. 98, 99 270; 161; Vel. Intrat. 42; *Offley v. Johnson*, 2 Leon. 166; Hardres. 561; 1 Barn. & Cressw. 685; 3 164; 2 Vernon, 592; 1 Cox, Mann. & Ryl. 445; Bac. Abr. 318; 3 Wils. 262, 346; 2 T. R. Obligation, (D 5); Pothier, *Traité des Contrat de Societé*, No. 142. 105; 7 T. R. 204, 568; 8 T. R.

DOBBIN v. WILSON and FABER.

In an action against *A.*, a plea in abatement alleging the non-joinder of *B.* as joint contractor, is not sufficiently verified by an affidavit stating that *A.* and *B.* were partners during the period within which the cause of action is stated in the special counts of the declaration to have accrued, but which does not shew that they continued in partnership down to the time laid in the common counts.

ASSUMPSIT for negligence on the part of the defendants as attorneys. In the special counts the promises were laid as being made in 1827; in the common counts they were laid in 1832. The defendants pleaded in abatement the non-joinder of *Leonard Raisbeck*. The plea was verified by the following affidavit. *W. H. F.* maketh oath and saith, that he this deponent is now, and was during and before the month of September, 1827, and has been since hitherto, a partner with *R. P.* as attorneys of this Honourable Court, and *R. P.* and *W. H. F.* were, during and before the month of September, 1827, and have been since hitherto, the London agents of the defendants. That from the 1st January, 1825, until the 30th June, 1829, the defendants carried on business as attorneys and solicitors, together with *L. Raisbeck*, also an attorney, &c., as copartners. That the deed of partnership duly executed by *Raisbeck* and the defendants, bearing date the 5th April, 1825, is now in the possession of this deponent. That during the said period, from the 1st January, 1825, to the 30th June, 1829, the defendants were employed as agents

as aforesaid, by *Raisbeck* and the defendants jointly, and that all business was transacted, and letters thereon signed, and documents indorsed, in their joint names, under the firm of *R., W., and F.*; that *Raisbeck* is now, to the best of his knowledge and belief, alive and residing at Stockton, within the jurisdiction."

The plaintiffs, conceiving this affidavit to be insufficient, signed judgment. This judgment *S. Temple* obtained a rule nisi for setting aside; against which

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Knowles now shewed cause. The plaintiff was entitled to sign judgment if the affidavit was insufficient, *Richards, Gent. v. Setree* (a). The statute 4 & 5 Ann. c. 16, s. 1, enacts, "that no dilatory plea shall be received in any Court of record, unless the party offering such plea do by affidavit prove the truth thereof, or shew some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true." The defendants here rely on the latter alternative, but the words "*probable matter*," used in that part of the clause, were held by the Court, in *Pearce v. Davy* (b), to have reference only to matters of record, which it might be necessary to shew to the Court. The meaning of the statute was, that wherever an affidavit was made it should distinctly verify the plea; but that where the plea could be verified by the production of any record within the power of the Court, there *probable matter of verification* might be shewn by exhibiting the record.

The affidavit is insufficient in other respects. The partnership of certain persons, whose names are given, is sworn to, but it is nowhere averred that they are the persons mentioned in the plea; for any thing that appears, there may be another firm practising at Stockton, the partners of which have the same names as those mentioned in the affidavit. It is consistent therefore that the affidavit may be

(a) 3 Price, 197.

(b) 1 Kenyon's Rep. 364; S.C. Sayer, 293.

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true, and yet the plea, which is assumed to be verified by it, may be false.

Another objection is, that the affidavit only extends over a period of time commencing in 1825, and ending in 1829. What is there to shew that the cause of action did not arise after 1829? In fact one of the promises in the declaration is laid in 1833.

The Court called on *Temple* to answer the last point.

S. Temple, in support of the rule. It was impossible here to obtain the usual affidavit, as only three full and available days are allowed for pleading in abatement, and the defendants live at a distance of 250 miles. This is therefore one of the cases in which probable matter was meant to be received. *Pearce v. Davy* is rather an authority in favour of the defendants. In that case it was contended that the affidavit was insufficient, as it did not state that certain nets mentioned in it were the same as those mentioned in the declaration; but the Court said, that notwithstanding that, they would have considered that probable matter was shewn if the affidavit had been correct in other respects. If this affidavit be held insufficient, it will be impossible that the plea in abatement can ever be had recourse to by persons living at a great distance from town, unless the agents choose to commit perjury, because *Pearce v. Davy* establishes that the affidavit must be positive, and not state anything on mere belief; and how could any agent,—indeed, how could the defendant himself, have sworn positively that the cause of action arose during a particular period, for how can he go beyond mere belief as to what the cause of action is at all? He may be perfectly ignorant of what part of his conduct the plaintiff is in fact suing him for, and at the most can only form a conjecture. He must therefore take it *prima facie* that the time laid in the declaration is the time when the cause of action arose,

and if so the affidavit shews that the partnership existed at that time. Besides, if the plaintiff intends to prove a cause of action at some other time when the partnership did not exist, he will be in a better situation by this plea, because it may take issue on the plea, and the defendants will have deprived themselves of any defence (a).

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DENMAN, C. J.—I think that upon this last ground, independently of the criticism upon the affidavit, the rule must be discharged.

Rule discharged.

(a) Except as to the quantum.

The KING v. The Justices of SUSSEX.

IN the course of this term Sir *J. Scarlett* obtained a rule calling upon the justices of Sussex to shew cause why a mandamus should not issue, commanding them to issue their warrant of distress for enforcing payment from the *Rev. John Austin*, clerk, Rector of *Tulborough*, in the county of *Sussex*, of the several sums assessed upon him by a rate made for the relief of the poor on the 24th day of August last. The following is a copy of the rate :

	£	s.	d.
<i>Austin</i> , <i>Rev. John</i> , House and Offices, Garden and Pleasure Grounds	35	17	6
Glebe Land, Parson's Woods, Cribbles and Wiltshires, with the Tithes of the same	92	2	6
Meadow Land	5	7	6
<i>Austin</i> , <i>Rev. John</i> , for Tithe of the whole Parish	866	10	0
Rate . . £99 19 6 on	999	17	6

Tithes, for which compositions have been entered into by the respective occupiers, may be rated in the hands of the rector in one entire sum.

Upon the refusal of the rector to pay such rate, the justices are bound, upon the application of the overseers, to issue their warrant for levying it, although such mode of rating be inconvenient to the practice.

This rate was properly made and published, and the sum rector, and contrary to former

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of 99*l.* 19*s.* 6*d.* was demanded from the rector, who refused to pay it, on the ground that he was assessed in one entire sum in respect of the tithes of the parish, instead of being assessed, as he had been in previous rates, in several sums in respect of the tithes not paid in kind, arising from the several farms in the parish. Upon complaint by the overseers of the parish of Tulborough to the justices of Sussex, assembled at Petworth on 2nd Nov. 1833, they summoned Mr. *Austin* to appear before them on a subsequent day, which he accordingly did. Facts were on that occasion stated before the justices as follows:

Mr. *Austin* is rector of the parish, and is entitled to the great and small tithes. There are in the parish seventy-nine occupiers of tithable land, of whom thirteen paid their tithes in kind, and sixty-six had entered into a yearly composition. Previously to the making of the rate in dispute, it had been customary to rate the tithe of each farm separately, and to receive the amount of the rate from each of the occupiers who paid the composition, at the same time that the rate on the land was received from him. The occupiers had the amount of the rate allowed by the rector when they paid the composition, and they were willing to pay the rate if the parish officers would receive it from them, but this they refused to do.

The magistrates having heard the parties, refused to enforce the payment of the rate, on the ground that no satisfactory reason had been adduced by the parish officers for having changed the mode of rating.

Campbell, S. G. and *G. F. Jones*, now shewed cause against the rule. The rector was led to suppose, after the hearing before the magistrates, that the rate was void. After the decision of the magistrates, and when all right of appeal was gone, a demand was made upon him, and this course of proceeding adopted. There is great inconvenience attendant upon this mode of rating, which is con-

try to the custom which has prevailed for years. If the rector is rated in one entire sum, he must ascertain the proportion which the tithe of each farm bears to the whole, and collect that proportion from each farmer, and thus be brought in contact with his parishioners several times in the year as a collector of the rates. Besides, if the rate on the clergyman be excessive, he will be under the necessity of valuing the whole of the parish valued, for the purpose of ascertaining what that excess is. According to the custom which prevailed, it might be only necessary to value a single farm which was supposed to be excessively rated. No benefit would accrue to the parish from the present mode of rating, and there is no doubt that the change was made to vex and harass the clergyman. [*Taunton, J.* Where impositions for tithes are entered into by the rector, the parish have a right to put his name on the rate for the entire sum, and they may have his responsibility for the whole. There are decisions in which this Court has refused a mandamus where the rate is clearly *illegal*. Are there any cases in which the Court has refused a mandamus on the ground of *inconvenience* in the mode of rating?] In *Rex v. The Justices of Bucks* (a), which was decided this term, the Court refused to grant a mandamus to do an act, the consequence of which might have been to render the magistrates subject to an action.

Here there is the appearance of a double rating. The rate is for the glebe lands, parson's woods, &c. *with the tithes* of the same; and then there is a charge for *the tithes* of the whole parish. It is, at all events, doubtful whether the rate be good.

Sir *J. Scarlett* and *F. Kelly*, contra. There is no doubt of the legality of the rate. The assessment is fair and reasonable; and although the clergyman may suffer inconvenience from the mode of rating, that is no reason for

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(a) *Ante*, 68.

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refusing the mandamus. Why should that inconvenience be cast upon the parish rather than on the clergyman? The rector is a member of the vestry, and can best apportion amongst the several persons who have entered into composition with him, the amount which he has been paid on the whole. There has been no vexatious proceeding on the part of the overseers, since they were advised that this was the proper mode of rating. It is clear that the whole sum is justly due. The poor are numerous; and without this mandamus there is no way of recovering this money.

DENMAN, C. J.—The Court has always been unwilling to compel magistrates by mandamus to issue their warrant to levy a poor-rate. If, however, it be perfectly clear that the rate is due and legal, this Court cannot with propriety refuse to interfere. In *Rex v. Benn* (a), the Court granted a mandamus, commanding the justices to receive such complaints as should be duly laid before them against such persons as should neglect to pay the poor-rate, and to proceed thereupon to levy the same. I am afraid we are bound by this case, since there is no sufficient reason given to us for refusing this mandamus. When the magistrates declared the rate to be void, they seem to have been led to that conclusion by some other circumstance than the consideration of the *legality* of the rate.

TAUNTON, J.—I accede to the making of this rule absolute, because we have no option. It occurred to me in the course of the argument, that where the rate on the tithes was made in this way, there would be considerable difficulty imposed upon the rector in ascertaining the sum which each occupier was to pay. The proper answer has been given. As rector of the parish, Mr. Austin must be in the vestry; he may therefore ascertain in what way the rate was made, and by a very simple process can calculate how much each

occupier ought to pay. I feel a strong impression that the alteration in the mode of rating was made for the purpose of oppressing the clergyman.

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PATTESON, J.—If I understand this case rightly, the justices have refused to issue their warrant on the ground that the rate was not properly made. I can see plainly enough what the object was in making the present rate in this manner. The rate is, however, a legal rate; and though it is in such a shape that it may put the clergyman to inconvenience, we cannot on that ground refuse this application. A second objection has been made to the rate, that it is double; but this objection is not tenable. If the glebe land is in the occupation of the rector, it is not tithable, but if not in his hand, the tithes in respect of it are part of the tithes of the parish.

Rule absolute, without costs.



WRIGHT v. DOE on the demise of TATHAM (in error)

In ejectment, where the question is devisavit vel non, evidence of the examination and cross-examination of one of the attesting witnesses to the will, who upon trial of an issue out of Chancery, between the same parties, and upon the same question proved the execution of the will, and is since dead, is admissible; and being admitted is entitled to the same degree of weight as the *vivâ voce* evidence of an attesting witness.

Therefore a will was held to be sufficiently proved by evidence of such examination where it appeared at the second trial, that another attesting witness was alive, within the jurisdiction of the Court.

In order to let in evidence of the examination of a deceased witness, upon a former trial, upon the same question, it is sufficient if the parties be substantially the same. Therefore it is sufficient, if in the former action a party is *plaintiff* or *defendant*, in the other, *lessor* of the *plaintiff* in ejectment.

Nor is it material that one of the parties to the second action was in the former action joined with several others who are not parties to the second action.

Nor that the former evidence was given upon the trial of an issue arising out of a bill in Chancery, which has been dismissed upon the motion of the plaintiff in error himself.

Where by a rule of Court, made by consent of parties previously to the trial in ejectment, it is ordered that the short-hand writer's notes of the evidence on the trial of an issue out of Chancery, shall be read in evidence as to such witnesses as might be dead or beyond sea, evidence given by the short-hand writer of the examination of a former trial of an attesting witness since dead, who proved the execution of a will, the due execution of which was in controversy on both occasions, is not only admissible evidence, on the ground of the agreement in the rule, but being admitted, is not secondary evidence, but is evidence of as high a nature as that of a living attesting witness.

A bill in Chancery filed by *A.* against *B.* and others, the answer of *B.* and his co-defendants, an order of the Master of the Rolls, directing an issue of *devisavit vel non*, that being the question in controversy between the parties, and the *nisi prius* record of the trial thereon, containing the finding of *devisavit* and judgment accordingly, is admissible and read upon the trial of an ejectment by *Doe* on the demise of *A.* against *B.*, in which the same question arose, are not even *prima facie* proof of the due execution of the will.

Dubitatur, whether upon a question in ejectment,—whether a testator, from the time of his attaining a competent age down to the time of the execution of his will, was of sound mind,—letters found amongst his papers shortly after his decease, and written by him at various periods of his life, by persons shewn to have been intimately acquainted with him, are admissible in evidence to shew the manner in which he was treated by such persons.

at the Lancashire spring assizes, 1833, it appeared that *Tatham* claimed to recover as heir at law of *Marsden*, who died seised, and that *Wright* defended, as devisee of *Marsden*. It became a matter in controversy between the parties, whether *Marsden* was, and from his attaining to competent age and down to the time of making the will in question, had been, a person of sane mind, and capable of making a will; and in order to prove the affirmative, *Wright* proposed to shew the manner in which *Marsden* was addressed at different periods of his life, by various persons who were well acquainted and intimate with him, in certain letters written by them to *Marsden*, and the subjects and occasions upon which such persons wrote the said letters. *Wright* then proved that certain letters were found among the papers of *Marsden*, shortly after his decease, and proposed to read many of these letters, which he proved to have been written to *Marsden* by persons well acquainted with him, and who were then dead. It was objected on the part of *Tatham*, that these letters were not admissible in evidence, and the learned baron so ruled; whereupon *Wright* excepted to the decision of the learned baron.


It was also in controversy between the parties, whether or not *Marsden*, by his last will and testament, bearing date the 14th June, 1822, and a codicil thereto, bearing date the 25th February, 1825, did devise the manors &c. mentioned in the declaration, so as to bar the title of *Tatham* as heir. In order to maintain the affirmative, it was proved on behalf of *Wright*, that in November, 1828, *Tatham* filed a bill in Chancery in respect of the same premises, against *Wright* and others, to which *Wright* and his co-defendants put in an answer. This bill and answer, and also an order of the Master of the Rolls for the trial of an issue of *devisavit vel non*, the *nisi prius* record of the issue, with the *postea* containing the verdict thereon, an order of the M. R. dismissing the bill, and an examined copy of the judgment entered up in the said issue in K. B., were severally tendered in evidence, and objected to on the part of *Tatham*, but re-

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ceived by the learned baron. Whereupon the counsel for *Tatham* excepted to the decision of the learned baron.

The order of the M. R., which was then read in evidence, recited that it was disputed whether *Marsden* ever did duly make, publish, and execute any will or codicil, so as to pass his real estate, and that it was asserted by *Wright* and his co-defendants, and denied by *Tatham*, that *Marsden* had duly executed a will, dated 14th June, 1822, and a codicil dated 25th February, 1825, attested by *Edward Tatham*, *Robert Proctor*, and *Giles Bleasdale*. His Honor therefore ordered that the parties should proceed to a trial at law, at the next Lent assizes to be holden for the county of York, on the following issue, *devisavit vel non*, the defendants in Chancery to be plaintiffs at law, and the plaintiff in Chancery to be defendant at law.

Proceedings
 on issue.

The defendant in ejectment produced the *nisi prius* record of the trial of the issue so directed, with the *postea* thereon; in which issue, *Wright* and his co-defendants in Chancery were plaintiffs, and *Tatham* was defendant. The question to be tried was, whether *Marsden* devised by his will or codicil, and the jury found that *Marsden* did devise, by his last will and codicil, the estates mentioned in the declaration.

An examined copy of the judgment of the Court of K. B. upon the issue was then read, and the decree of the M. R. dismissing *Tatham's* bill.

Order for read-
 ing notes of
 former trial.

For *Wright*, a rule of K. B. made in this ejectment was produced, whereby it was ordered upon consent, *inter alia*, that the short-hand writer's notes and the judge's notes of the evidence on the trial of the issue, of witnesses who should be dead or beyond sea, should be read in evidence upon the trial of the ejectment.

At the trial of this ejectment, *Wright's* counsel called *Fraser*, a short-hand writer, who, being sworn and examined, stated that *Bleasdale* was examined and cross-examined on the trial at York as a witness, that he was dead, and that he deposed as follows: that *Marsden* executed the will of 14th June, 1822, and that the three witnesses who attested

it, viz. *R. P.*, *E. T.*, and himself, were present; that *Marsden* signed his name to every sheet of the will in their presence; and so of the codicil of the 23th February, 1825.

Another witness called on the behalf of *Wright*, produced the will and codicil, and stated that they were the same which were produced on the trial of the issue; that they were then put into the hands of *Bleasdale*, who proved the execution; and that *Bleasdale* died in November, 1831. This witness, upon his cross-examination, stated that *Robert Proctor*, by whom the will and codicil were respectively attested, was alive and then present in court at Lancaster, and had been subpoenaed as a witness on behalf of *Wright*.

The will and codicil of *Marsden* were produced on behalf of *Wright*; and it was proved that they were the will and codicil which were proved and read in evidence on the said trial at York, and were referred to and mentioned in the said proceedings in Chancery, and in the said issue, and also in the said nisi prius record, and in the said judgment; and the said will and codicil were offered to be read in evidence. The counsel for *Tatham* objected that the will and codicil could not be read in evidence until their execution had been proved by the living attesting witness, who was then present in Court. And the learned baron thereupon stated his opinion to be, that the will and codicil could not be read in evidence, and refused to admit the same, unless the said living attesting witness were called by the defendant to prove the execution thereof. Whereupon the counsel for the defendant made his exception to the said opinion of the learned baron. And thereupon the learned baron stated his opinion to be, that the evidence, so as aforesaid given by the said defendant, did not sustain the affirmative of the second matter in controversy, as to the will and codicil, and directed the jury to find a verdict for the plaintiff. Whereupon the defendant's counsel made his exception.

The learned baron set his hand to a bill of exceptions,

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stating the above evidence and exceptions, according to the form of the statute.

The jury, according to the direction of the learned baron, returned their verdict for the plaintiff, and judgment for the plaintiff was signed on the 3d May, 1833.

A writ of error having issued to the Lord C. J. *Denman*, commanding him to send to the Justices of the Bench and Barons of the Exchequer, in the Exchequer Chamber, pursuant to 1 *Will.* 4, c. 70, a transcript of the record and proceedings in this action, with all things touching the same, the Chief Justice *Denman* certified a transcript of the record containing the record and process, and all matters touching the same.

The matters returned by the Lord Chief Justice were in substance as has been stated above.

The errors assigned by the plaintiff in error were, the several rulings by the learned baron to which exceptions were, at the trial, made on the behalf of *Wright*.

Joinder in error.

F. Pollock for the plaintiff in error.

First exception
 of defendant
 below :
 Whether the
 letters were
 admissible.

I. Evidence of the letters ought to have been admitted to shew the manner in which *Marsden* was treated by those who were well acquainted with him. Suppose a person, proved to have been intimate with *Marsden*, had been *heard* to address him in a particular manner, would not that have been evidence upon a question of whether *Marsden* was or was not of sound mind? (He was about to read one of the letters rejected, when *Tindal*, C. J. said, " You have a right to assume that the letters are of the most favourable description; and as the letters are not set out in the bill of exceptions, they had better not be read.") If letters relating to science, literature, &c., were found in a man's desk after his death, written to him by eminent men of his day who were well acquainted with him, would they not be evidence upon a question of his sanity at the period at which the

letters were written? If letters were found treating a man as a fool, would not these be evidence, after his death, of his having been of unsound mind? [*Gaselee, J.* Such evidence frequently admitted.] *Buckler v. Barnett* (a), *Wheeler v. Alderson* (b), and *Dr. Haggard's* note to *Waley v. Houtt* (c).

II. The second question is, whether, in order to prove the will, it was necessary to call *Proctor*, the living attesting witness; and this question divides itself into two points:

I. Whether the verdict upon the trial of the issue, the judgment of the Court of K. B. thereon, and the decree of the M. R. dismissing the bill, are not of themselves sufficient to dispense with the giving of any other evidence, as affording *prima facie* evidence of the will; and this with or without the production of the will?

II. Assuming the evidence of an attesting witness to have been necessary, was the evidence of *Bleasdale's* former depositions a sufficient compliance with the supposed rule of law?

I. The freehold estate which is the subject-matter of the ejectment, is the same as that which is the subject-matter of the bill in equity, &c.; and the parties are substantially the same; for *the lessor* of the plaintiff and the defendant are substantially the parties in this ejectment suit. The evidence produced was sufficient; *Strutt v. Bovingdon* (d), *Kitchin v. Campbell* (e), *Outram v. Morewood* (f), *Whateley v. Menheim* (g), *Hancock v. Welsh* (h), Bull. N. P. 234, *Vooght v. Winch* (i), *Burnett v. Lynch* (k), *Scott v. Shearman* (l), *Smartle v. Williams* (m). If *Bleasdale* had been alive, therefore, there would have been no necessity of calling him.

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Second exception of defendant below:
Necessity of calling attesting witness.
First question.

Second question.

First question.

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| (a) MS. | (g) 2 Esp. N. P. C. 608. |
| (b) 3 Haggard's Rep. 609. | (h) 1 Stark. N. P. C. 347. |
| (c) Ibid. 770. | (i) 2 Barn. & Alders. 662. |
| (d) 5 Esp. N. P. C. 56. | (k) 8 Dowl. & Ryl. 368; 5 |
| (e) 3 Wilson, 304; 2 Bla. Rep. | Barn. & Cressw. 589. |
| 27, per nomen <i>Hitchin v. Campbell</i> . | (l) 2 Bla. Rep. 977. |
| (f) 3 East, 346. | (m) 1 Salk. 245. |

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Second question.

II. If the evidence of an attesting witness was necessary, that evidence has been given. The evidence of *Bleasdale*, there can be no doubt, was properly received. Here was a rule of Court made by consent, which contains an express order that the short-hand writer's notes, and the judge's notes of the evidence on the former trial, should be read in evidence on this trial, as to such witnesses as should be dead or beyond sea. It is also receivable on general grounds, for the evidence of a witness sworn on a former trial, upon the death of that witness, is receivable in a subsequent trial between the same parties upon the same subject-matter; *Rex v. Jolliffe* (a), *Strutt v. Boringdon* (b), *Mayor of Doncaster v. Day* (c). Fifth resolution in *Pyke v. Cronch* (d). If *Bleasdale's* examination be admissible in evidence, its effect is precisely the same as if he had been present and examined on the trial of the ejectment cause; and therefore the will and codicil ought to have been received in evidence.

First exception
of defendant
below.

Sir *James Scarlett*, contra. First, with respect to the question as to the admissibility of the letters. The contents of the letters may be considered in two points of view, either as stating facts, or as stating opinions. Statements of facts or of opinions, are excluded by the law of the country, unless made upon oath. The evidence offered was in some respects analogous to hearsay evidence. The authorities in the Ecclesiastical Court which have been cited are not applicable to cases at common law. If the Court are of opinion that the will was properly produced and ought to have been read, the necessity of admitting the letters need not be considered.

Second exception
of defendant
below.

II. The attesting witness, who was living and within the jurisdiction of the Court, should have been called. The general rule is, that if there be a living witness he must be called. Is this an exception to the general rule? The

(a) 4 T. R. 285.

(b) 5 Esp. N. P. C. 56.

(c) 3 Taunt. 262.

(d) 1 Lord Raym. 730.

Court will not lightly except a case out of a general rule of evidence, more particularly when such rule applies to the case of a will. The only exceptions which have been allowed, have been in cases of necessity. What necessity was there here for the admission of *Bleasdale's* examination? There was a living attesting witness within the jurisdiction of the Court; *Hinds v. James* (a).

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Mr. Pollock has said, that if *Bleasdale* had been alive there would have been no necessity for calling him, and he has stated that the former proceedings were *primâ facie* evidence: The bill in Chancery is no evidence even as against the plaintiff by whom it is filed. Nor is the answer evidence: That which a man states for himself, is not evidence for him. The whole that the bill, answer, and decree establish, is, that there were such proceedings. A bill dismissed especially is not evidence. In *Call v. Dunning* (b) it was held, that the answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, is only secondary evidence, and cannot be received as evidence *per se*, without shewing that due diligence has been used to discover who the subscribing witness was, who was alleged to be unknown. These proceedings were only secondary evidence, another attesting witness being alive. The best evidence must be produced. Therefore, though the verdict and judgment were evidence, a living attesting witness ought to have been called, as being better evidence.

First question.

The examination of *Bleasdale* was undoubtedly admissible, but it was not the best evidence. Suppose *Bleasdale* had been alive, his examination would only have been secondary evidence. The rule is, that a fact must be proved by the best evidence of which the nature of the thing is capable. *Proctor's* evidence was as good as *Bleasdale's*, if *Bleasdale* had been alive; consequently the examination of *Bleasdale* was evidence secondary to that of *Proctor*. [*Vaughan, B.* Suppose *Proctor* had been called, could *Bleasdale's* exami-

Second question.

(a) Comyns's Rep. 531.

(b) 4 East, 53.

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nation have been given in evidence?] It could ; but it could not have done away with the necessity of calling *Proctor*. The whole question seems to be,—is it a case of necessity ? for otherwise the evidence is inadmissible.

The statute of frauds has required a will devising lands to be attested by three witnesses. This statute, independently of the common law rule already alluded to, would render the testimony of the surviving attesting witness necessary to be given. To dispense with this evidence, by allowing the will to be read upon evidence given of the examination of a deceased attesting witness, before all the three witnesses are dead or out of the reach of the Court, would be in effect to destroy the security intended to be given by the statute. As no necessity has been shown for admitting the examinations of *Bleasdale*, the living witness should have been called, which not having been done, the defendant was not entitled to have the will read.

F. Pollock, in reply. First, the letters were not produced for the purpose of proving a fact or an opinion, but they were produced to prove the mode of treatment. When a witness has been examined who is since dead, his examination is as good between the same parties, as his living testimony. It is true that the statute requires the will to be attested by three witnesses, but the argument of Sir *J. Scarlett* goes to establish a necessity of calling all the three witnesses to prove the will, which is clearly not necessary.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.

Upon the argument of this writ of error, the two exceptions which were taken by the defendant below to the direction of the learned judge at the trial of the cause, and which are specially assigned as errors upon this record, have been fully discussed before us.

The first exception is taken upon the refusal by the learned judge to admit in evidence certain letters which were offered by the defendant below. Those letters were proved to have been written by different persons, well acquainted with the late *John Marsden*, at different periods of his life, to have been addressed to him in his lifetime, and to have been found amongst his papers shortly after his death, the writers of such letters being dead at the time of the trial. Upon this exception there exists a difference of opinion in the Court, on the point whether such letters were admissible in evidence or not. But as all the judges agree that the second exception ought to be allowed, and as the consequence of such allowance is, that a venire de novo must be awarded, it becomes unnecessary on the present occasion to enter into any discussion of the particular views taken by the judges as to the first exception.

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 First excep-
 tion.

The second exception was taken to the opinion delivered by the learned judge at the trial, as to the admissibility in evidence of the will and codicil of *Marsden*. It was ruled by him, that the will and codicil could not be read in evidence, until the surviving attesting witness to such will and codicil, who was proved to be within the jurisdiction of the Court, was called and examined as to the execution of them; and that the necessity of calling such surviving witness, was not dispensed with by the producing and reading in evidence the examination and cross-examination of another of the attesting witnesses to the will and codicil, taken upon a former trial at law, upon an issue between the same parties, and upon the same question now in controversy. And upon this point we are all of opinion that the will and codicil, after the production of the evidence above stated, were admissible, and ought to have been received in evidence without further proof; and consequently that the second exception must be allowed.

Second excep-
 tion.

In order to explain the reasons upon which our opinion is formed upon this second point, it will be proper to

Ground upon
 which second
 exception
 maintainable.

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consider, in the first place, the ground upon which we hold the examination and cross-examination of the attesting witness to the will, to be admissible in evidence after the death of such witness, for *any* purpose, as between the parties to the present suit; and secondly, the degree and character of such evidence, and the effect and weight to which it is entitled, when once admitted, with reference to the subject-matter in dispute.

In the course of the argument indeed, on the part of the plaintiff in error, it was strongly pressed upon us that the proceedings in the Court of Equity and Law, which are set forth in the bill of exceptions, formed such a *prima facie* case in favour of the will, as, if not to dispense with the necessity of giving any further evidence whatever on the part of the defendant below, at all events to let in the reading of the will. Upon this point it will be sufficient to say, that we are all agreed that such proceedings had *not* such effect. For unless they could be held to go the length of creating *an estoppel* against the plaintiff below, we see no ground for holding them to constitute a *prima facie* case in his favour; and that they could not constitute *an estoppel*, appears sufficiently clear from the nature of the proceedings themselves, as set out on the record.

As to the second ground of exception, the facts are these: *Tatham*, the lessor of the plaintiff, filed his bill in Chancery against *Wright*, the defendant in the present action, and three other persons; and upon the answers coming in, the Master of the Rolls directed an issue at law upon the question, whether *Marsden* did devise his estate or not by the very identical will which is now in dispute? It was further proved, that a trial of such issue, in which *Wright* and the other defendants in the Chancery suit were the plaintiffs, and *Tatham* was the defendant, afterwards took place; and that on the trial of that issue, *Bleasdale*, one of the attesting witnesses to the will, was called and examined on the part of *Wright*, and was cross-examined

the part of *Tatham*. Now if the former trial had taken place in a suit between *Wright* and *Tatham*, and those persons alone, no doubt could have been raised that after the death of this witness, the evidence which he had given upon the former trial would be admissible upon the second. For in that case it would have been evidence given in a trial between the very same parties, upon the same subject-matter, at a trial on which *Tatham* had the right to object to the competency of the witness, to cross-examine him, and to contradict him by other testimony. Upon such a state of facts, therefore, it is unnecessary to cite cases to the point, that the evidence of this witness given on the former occasion would, after his death, be admissible at the second trial.

But the only distinctions between the case above supposed, and the present, are, that *Wright* was not the only party, but was joined with other plaintiffs in the former action; and that *Tatham*, instead of being the plaintiff in the present action, is only the lessor of the plaintiff. But we think that neither of these circumstances makes any difference as to the admissibility of the evidence in question. For the result of the authorities is, that the lessor of the plaintiff is the real party in an ejectment; that the nominal plaintiff has no interest; and that *J. S.* is bound by a verdict for the defendant in an ejectment between *Doe* on the demise of *J. S.*, against *B. (a)*. Neither can any real difference arise from the circumstance, that in the former action the present defendant *Wright* was joined with other persons as plaintiff. For *Tatham* had precisely the same power of objecting to the competency of *Bleasdale*, the same right of cross-examination, and of calling wit-

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First ground of dispensing with examination of surviving attesting witness.

(a) A fortiori, would *Doe* be bound by a former verdict and judgment between *J. S.* and *B.*, supposing the demise to *Doe* to be laid, as we, on a day subsequent to such judgment; for the demise being admitted by the consent rule, must in

the action of ejectment be considered as having all the properties of an actual demise. *Doe* therefore being privy in estate to *J. S.*, both *Doe* and *B.* would be bound by the estoppel. Vide 1 Salk. 276; Com. Dig. *Estoppel*, (B.)

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nesses to discredit or contradict his testimony on the former trial, as he would have had if *Wright* had been the sole plaintiff in that suit, or as he would have had now, if *Bleasdale* had been alive and had been subpœnaced as a witness. It is manifest, therefore, that the verdict on the former trial, and the examination of witnesses on each side, did not take place in a suit between third parties, or strangers, but virtually and substantially between the very same parties who are parties to the present suit, and upon the very same subject-matter of dispute. Nor can there, as it appears to us, be any objection to the admissibility of this evidence, on the ground of the plaintiff in equity having thought proper since the trial to dismiss his own bill. For whether the bill is dismissed or not, the evidence was given in the course of the trial of an action in a Court of common law, under the obligation of an oath. The witnesses upon that trial are equally liable to the penalties of perjury, if they have wilfully forsworn themselves, whether the bill in equity is dismissed or not; and the evidence given at the trial cannot be affected in its weight or character, by the voluntary act of the plaintiff in equity in dismissing his own bill, the effects of which, as to the consequences above adverted to, can be no other or different than if the plaintiff in an action at law had elected to be nonsuited, rather than have a verdict pass against him.

Second ground. But upon another, and *that* a perfectly distinct ground from the former, we think the examination of *Bleasdale* was admissible in evidence on the present trial, for a rule of Court was made by consent in the present cause, which contained an express agreement between the parties in this cause, that the short-hand writer's notes, and the judge's notes of the evidence on the former trial should be read in evidence on this, as to such witnesses as should be dead or beyond sea. After this agreement between the parties we think it was not open to the plaintiff to dispute the evidence given by *Bleasdale* on the former trial being

and in evidence on the present trial, his death having been first proved.

If therefore such evidence be, as we think it is, producible, the only question that remains is, what is the character and degree of that evidence, and for what purpose can it be produced? And it seems to us that such evidence is direct and immediate evidence in the cause, and is productive in evidence in the cause, for the same purpose and to the same extent as if the witness himself had been alive and sworn, and had given the same evidence in the witness box in the present cause (a). For unless the evidence is carried to this extent, it is impossible to define any line or limit to which it shall be held to extend.

It is objected on the part of the plaintiff below, first, that the admitting of this evidence is in contravention of the rule of law by which the best evidence is required to be given in every case; for it is contended that the *vivâ voce* evidence of *Proctor*, the surviving attesting witness, is better evidence than the examination of *Bleasdale*, who is dead.

But we think this argument assumes the very point in dispute. If the evidence which had been offered of the execution of the will had consisted simply in proving the handwriting of *Bleasdale*, one of the attesting witnesses, which would have been the legitimate mode of proving the attestation by him after his death, it might indeed have been objected, with some ground of reason, that such evidence could not be the best, whilst another of the attesting witnesses was still alive, and within the jurisdiction of the Court. For in that case the proof of the handwriting only would have done no more than raised the presumption that he witnessed all that the law requires for the due execution of a will; whereas the surviving witness would have been able to give direct proof whether all the requisites of the statute had been observed or not. Such direct testimony therefore might fairly be considered as evidence of a better

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nation.

(a) And see *Alison v. Furnival*, Crompt. Mees. & Rosc. vol. i. part 2.

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and higher nature, than mere presumption arising from the proof of the witnesses handwriting—*Stabitur presumptio, donec probetur in contrarium.*

The effect, however, of *Bleasdale's* examination is not merely to raise a presumption, it is evidence as direct to the point in issue and as precise in its nature and quality as that of *Proctor* when called in person. It is direct evidence of the complete execution of the will, by the statement upon oath of the observance of every requisite made necessary by the statute of frauds. If *Proctor* had been examined in the present action by the plaintiff below, there can be no doubt but the examination of *Bleasdale* on the last trial might have been put in to contradict him. But on what principle could such contradiction have been admissible, unless the evidence obtained by means of the examination was of as high a character and degree as that of the *vivâ voce* examination of the surviving witness? If the parol examination of *Proctor* was the better evidence, as contended for, how could it have been opposed by the inferior evidence of *Bleasdale's* examination?

It was objected secondly, that to allow this testimony, that is, to dispense with the necessity of calling the surviving attesting witness, is in effect to destroy the security intended to be given by the statute of frauds. For it is said, that as that statute requires the attestation of three witnesses, so to allow the will to be proved upon a trial at law, without calling an attesting witness, whilst one of the three remains in life, is to give up the full benefit of having three witnesses to the will. It may be observed, however, that the statute of frauds did not look primarily to the mode of proving the will when contested, but to the security of the testator at the time of the execution of the will; the statute intending that the three witnesses should be in the nature of guards or securities to protect him in the execution of his will against force, or fraud, or undue influence. The proof of the will by the three witnesses, supposing it should afterwards come in contest, is only an

incidental and secondary benefit derived from that mode of attestation. Indeed the principle of this objection, if carried to its full extent, would require the will to be proved in every case by the *three* witnesses.

It is well settled, however, that in an action at law it is sufficient to call one only of the subscribing witnesses, if he can speak to the observance of all that is required by the statute (*a*); and the objection itself is obviously open to the same answer which has been given to the first, viz. that the evidence resulting from the written examination of the deceased witness, in a former suit between the same parties, is of as high a nature, and as direct and immediate, as the *vivâ voce* examination of one of the witnesses remaining alive, and actually examined in the cause.

Upon the whole we think, that after the proof given in this case of the examination of *Bleasdale*, and his subsequent death, the will and codicil were receivable in evidence, without further proof, and consequently that a *venire de novo* must be awarded.

Judgment reversed (*b*).

(*a*) And see *Longford v. Eyre*, 1 P. Wms. 741; *Lowe v. Jolliffe*, 1 W. Bla. 365; *Goodtitle d. Alexander v. Clayton*, 4 Burr. 2224.

(*b*) And see *Lord Carrington v. Payne*, 5 Ves. 411; *Wood v. Stane*, 8 Price, 619; *Bootle v. Blundell*, Cooper, 136.

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ment by estate by reason of the devise, which was communicated to *A. Fryer*, and through him to the pauper.

To prove a surrender to the use of *Robert Furniss's* will, the steward produced the book of the records (a) of the manor, and read from it an entry of the admittance, reciting a surrender, in 1774, of the property in question, to the use of the will. He also stated that he had not been able to find the surrender itself upon the roll or elsewhere, except as recited in the admittance: that the old surrenders appeared to have been kept in a very loose and irregular manner; that the originals are often not to be found; and further, that there are many surrenders to the use of wills noticed on the records, the originals of which are not to be found; but that he had not been able to discover any other instance in which there was not either the original surrender itself, or a record of a surrender on the court rolls.

The opinion of the Court is requested—1st. Whether, under the circumstances above stated, the entry in the book of the records of the manor was evidence of a surrender to the use of the will?

2dly. Whether the admittance of the grandfather in 1790 related back to his possession in 1780?

3dly. Whether the opinion of the Court be in the affirmative as to these points, then the order of removal to stand.

4thly. Whether the opinion of the Court be in the negative as to either of them, then the opinion of the Court is requested as to a third point, viz. whether the residence of the grandfather for more than 40 days on the devised property, (he having the right of admittance,) was sufficient to confer a settlement by estate. If the Court be of opinion that it was, then the order of sessions is discharged, and the order of removal to stand.

Mr. Serjeant, in support of the order of sessions. The first

The records of the customary as well as those of the court formerly consisted of separate rolls filed together; but for the last 100 years it has been usual to make the entries in books. To these entries the name of court rolls is still continued.

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IN THE
COURT OF KING'S BENCH

IN
EASTER TERM,

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The KING v. The Inhabitants of THRUSCROSS.

A surrenderee gains a settlement by a residence of 40 days upon a copyhold, to which he afterwards is admitted.

Seemle, that the settlement is complete without the admittance,

AN order, whereby *James Fryer* and his wife and children were removed from the township of Thruscross, the West Riding of Yorkshire, to the township of High and Low Bishopside, in the same riding, was quashed upon appeal, subject to the opinion of this Court upon the following case :

Upon the death of *Robert Furniss*, in 1780, *S. Fryer*, pauper's grandfather, entered upon a copyhold in High and Low Bishopside, devised to him under the will of *Furniss*.
Pauper's father, *A. Fryer*, then about sixteen years of age

ment by estate by reason of the devise, which was communicated to *A. Fryer*, and through him to the pauper.

To prove a surrender to the use of *Robert Furniss's* will, the steward produced the book of the records (a) of the manor, and read from it an entry of the admittance, reciting a surrender, in 1774, of the property in question, to the use of the will. He also stated that he had not been able to find the surrender itself upon the roll or elsewhere, except as recited in the admittance: that the old surrenders appeared to have been kept in a very loose and irregular manner; that the originals are often not to be found; and further, that there are many surrenders to the use of wills noticed on the records, the originals of which are not to be found; but that he had not been able to discover any other instance in which there was not either the original surrender itself, or a record of a surrender on the court rolls.

The opinion of the Court is requested—1st. Whether, under the circumstances above stated, the entry in the book of the records of the manor was evidence of a surrender to the use of the will?

2dly. Whether the admittance of the grandfather in 1790 had relation back to his possession in 1780?

If the opinion of the Court be in the affirmative as to *both* these points, then the order of removal to stand.

If in the negative as to *either* of them, then the opinion of the Court is requested as to a third point, viz. whether the residence of the grandfather for more than 40 days on the devised property, (he having the *right* of admittance,) was sufficient to confer a settlement by estate. If the Court be of opinion that it was, then the order of sessions to be discharged, and the order of removal to stand.

Milner, in support of the order of sessions. The first

(a) The records of the customary court, as well as those of the court baron, formerly consisted of separate parchment rolls filed together;

but for the last 100 years it has been usual to make the entries in books. To these entries the name of court *rolls* is still continued.

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question submitted to the consideration of the Court is, whether there was evidence of a surrender in 1774. [Lord Denman, C. J. Can you seriously contend that this is not evidence ?] The question is, whether, from this evidence, the sessions were *bound* to find a surrender? In *Rex v. Lubbenham* (a) a similar question was raised. [Parke, J. The Court of Quarter Sessions considered it to be no evidence at all.] Then as to the second question. The grandfather was not admitted until 1790. Until that period his title was not complete; no settlement therefore was gained by him, and consequently the pauper could not have a derivative settlement from him. A copyholder, until admittance, is a mere tenant at will. He is scarcely so much as tenant at will (b); he is a mere occupier, and has no title against the lord. The grandfather was devisee, not heir at law; and where there is a defective devise, a Court of Equity will not compel the lord to admit the devisee; *Sampson v. Sampson* (c). [Parke, J. The question is, whether the settlement is not good by relation. *Patteson*, J. It has been held that the admittance has relation to the surrender.] To gain a settlement by estate the party must be irremovable for 40 days. The grandfather was not so, as the lord might have removed him at any time. The admittance could not, by relation, make the party *to have been* irremovable during an antecedent period.

Blackburne, and Sir *G. Lewin*, *contra*. The question is, whether the grandfather had such an interest in the copyhold before admittance, as would prevent the *overseers* from removing him from the possession of the estate. The surrender is the substantial part of the conveyance of copyhold; the admittance is mere form. Every act done by the surrenderee after surrender, and before admittance, is *valid*, although he has not a complete legal estate. If a party has merely the right of occupation, he is irremovable. In *Rex v. Butterson* (d), the party from whom the settlement was

(a) *Ante*, 37.

(b) 2 Black. Com. 147.

(c) 2 Ves. & B. 337.

(d) 6 T. R. 554.

derived had been in possession nearly twenty years. Lord *Kenyon*, C. J., says, "The strict rules to be observed on trials of ejectments ought not to be applied to settlement cases. After such a length of possession as this, perhaps a conveyance may be presumed." Before admittance, a demise by the surrenderee is valid (a). If he has such an estate as will support a demise in ejectment, surely he has such an estate as would prevent the overseers from removing him. Nothing was required to clothe the party with the legal estate, except a formal admittance. He might have applied to this Court for a mandamus, or to a Court of Equity, and might have compelled the lord to admit him. A cestui que trust, who resides on the trust estate by permission of the trustee, gains a settlement; *Rex v. Holm, East Waver Quarter* (b). In *Ashbottle v. Wyley* (c) it was held, that a party who cannot be turned out of possession by ejectment, is not removable on the ground of chargeability. [Parke, J. During the time of his actual occupation, the grandfather might have been turned out of possession by the heir at law. I think you will find that a copyholder, before admittance, has no estate either at law or in equity; *Rex v. Wilson* (d).] The heir at law would be a trustee for the devisee. [Parke, J. That is the question. *Littledale*, J. It has been held that a surrenderee, before admittance, cannot devise.] He is entitled to take the profits of the estate. A sole next of kin gains a settlement by residing 40 days upon the leasehold estate of the intestate, although during that period administration be not taken out; *Rex v. Horsley* (e), *South Sydenham v. Sumerton* (f).

Lord DENMAN, C. J.—This case is to me clear of all

(a) That is, provided an admittance has taken place before the time at which the validity of the demise is to be determined. See *Scriven on Copyholds*, vol. i. 556, and the cases there collected.

(b) 16 East, 127.

(c) 1 Str. 608.

(d) 5 Mann. & Ryl. 140; S. C. 10 Barn. & Cress. 80.


(e) 8 East, 405.

(f) Cas. of Set. 95, cited in Burn's Justice, "Poor—Settlement by Estate."

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doubt. A person who has a right to enjoy an estate is irremovable. This man had a right to enjoy the estate against all the world. He therefore gained a settlement by virtue of the interest he possessed.

LITLEDALE, J.—I think the grandfather had a sufficient estate to confer a settlement. A surrenderee has not an equitable *estate*. He cannot devise his interest; but he has an equitable *interest* from which he cannot be removed. After admittance he would be entitled to all the previous rents and profits of the estate, and has in fact a substantial interest from which he cannot be removed by the parish officers. The question is not whether he was removable by the customary heir, or by the lord, but whether he was removable by the parish officers.

PARKE, J.—Had I known that my lord was about to express his opinion, I should have wished for time to consider this question. At present I am not prepared to concur with the judgment of my lord and my brother *Littdale*. The first question, with respect to the evidence, has already been disposed of. The next point is, whether the grandfather gained a settlement by estate; and that depends on the question, whether the surrender and the admittance, and the relation of the admittance to the surrender, made the party irremovable. It appears to me that the relation of the admittance to the surrender had not that effect. There is no doubt that, by relation, mesne incumbrances of the surrenderor will be avoided, and a demise in ejectment by the surrenderee will be supported. But it will not render a party irremovable. The circumstance of the subsequent admission may therefore be laid out of the question, and the case comes to this, whether a surrenderee, before admittance, has such an *estate* as renders him irremovable. I think he has not. A surrenderee, before admittance, has neither an equitable nor a legal estate. He may disclaim (*a*)

(*a*) Such disclaimer may be by *wood*, 4 Mann. & Ryl. 169(*a*), and parol; *Rex v. Wilson*, 5 Mann. & Ryl. 191, n.
 Ryl. 140; and see *Small v. Mar-*

the estate. The whole right he has is to compel the lord to admit him. No case has yet gone so far as to say that a person who has neither an equitable nor a legal estate gains a settlement.

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PATTESON, J.—I am of opinion that a settlement was gained, but not on the ground that the devisee of copyholds, before admittance, has an *equitable estate*, for he has neither an equitable nor a legal estate. The principle of *Rex v. Holm, East Waver Quarter*, appears to be this, that wherever a party resides for 40 days on an estate of which he could compel the conveyance, he gains a settlement. The devisee in this case could compel the lord to admit him, and has a species of an *equitable interest*, and therefore he gained a settlement. In *Rex v. Holm, East Waver Quarter*, an estate was devised to trustees in trust, to be let during the life of the testator's daughter, and to pay her the rents, deducting expences. She, being merely a cestui que trust, resided on the estate by the permission of the trustees, and it was held that she gained a settlement. That seems to go further than this case.

Order of Sessions quashed.

The KING v. The Inhabitants of QUANTON.

UPON an appeal against an order, whereby *James Friday Carter*, and his wife and child, were removed from *St. James's*, Clerkenwell, Middlesex, to Quanton, in the county of Bucks, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the following case:

21 October, 1820. By indenture of this date, the pauper, *J. F. Carter*, being a poor boy and a settled inhabitant of *St. James's*, Clerkenwell, Middlesex, was bound by the parish officers in contemplation of the binding, but without any express stipulation to that effect: Held, that this was not an expense within 56 Geo. 3, c. 139, sect. 11, making requisite the assent of two justices to the indenture.

The premium for an apprenticeship was paid by the trustees of a charitable fund. On the day of the binding, the apprentice was provided with a suit of clothes by the parish.

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Quainton, was by the trustees of a charity, established under the will of the late Dowager Lady *Say and Sele*, for placing out poor boys of Swanbourne apprentices, bound as an apprentice, with a premium of 20*l.*, to *Thomas Carter*, of Swanbourne, Bucks, butcher, for seven years. He served as an apprentice under that indenture so as to gain a settlement in Swanbourne, if the indenture was valid. The whole of the premium was paid out of the charity fund, and no other premium or consideration was paid to the master from any other source. The costs of the indenture were paid by the master out of the premium, but on the 20th October, 1820, the day before the binding, the pauper was provided with a full new suit of clothes by the parish officers of Quainton, which were paid for out of the public parochial funds, by one of the churchwardens, to the tradesmen from whom the different articles were purchased, which would not have been given to the pauper at that time, but in prospect of his being so bound apprentice, though no stipulation to that effect was made by or with the master. The indenture of apprenticeship had not the sanction or signature of any justices of the peace. By 56 *Geo. 3*, c. 139, s. 11, after reciting that the salutary provisions of 43 *Eliz.* c. 5, were frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, was clandestinely provided by parish officers, who were thus enabled to bind out such poor children without the sanction of justices of the peace, it was enacted, that no indenture of apprenticeship, by reason of which any expense whatever should at any time be incurred by the public parochial funds, should be valid and effectual, unless approved of by two justices of the peace, under their hands and seals, according to the provisions of the former act and of that act. If, therefore, the Court of K. B. shall be of opinion that there is in this transaction such an incurring of expense, by the public parochial funds, as was contemplated by the statute, the order of sessions to be confirmed, if otherwise, to be quashed.

Bodkin, in support of the order of sessions. In *Rex v. Mattishall* (a), before the execution of the indenture of apprenticeship, the master said that the apprentice should have better clothes before he took him. The apprentice applied to the overseers of the poor, who agreed to give him 2*l.* on the execution of the indenture, for the purpose of buying clothes, which they accordingly did. It was held, that the money so paid was an expense incurred by reason of an indenture of apprenticeship, within 56 *Geo.* 3, c. 139, s. 11. This case is within the mischief intended to be prevented by the act. [*Parke, J.* In *Rex v. Mattishall* the buying of the clothes was part of the consideration. In *Rex v. St. Peter, Hereford* (b), it was held, that the act extended only to cases where the execution of the indenture is directly or indirectly obtained by parish officers.] *Rex v. Mattishall* shews that the Court will give a liberal construction to the act. [*Parke, J.* The overseers had nothing to do with the binding, directly or indirectly.] It cannot be contended that the money for the clothes was any part of the consideration of the binding, but the words of the section are sufficiently large to include this case. The words are, "any expense whatever incurred by the public parochial funds." It is expressly found in this case, that an expense *was* incurred by the public parochial funds.

The COURT, without calling upon *Adolphus*, who was to have argued on the other side, quashed the order.

Order of Sessions quashed.

(a) 3 Mann. & Ryl. 386; 8 Barn. & Cressw. 733. (b) 1 Barn. & Adol. 916.

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A. demises to *B.*, who underlets to *C.* In the middle of both terms it is agreed between *A.* and *B.*, that *B.*'s tenancy shall cease, and between *A.* and *C.* that *C.* shall hold under *A.* for a longer term. This arrangement enures as a surrender from *B.* to *A.*, and a new demise from *A.* to *C.*

A. lets a house for a year at 20*l.* to *B.* *B.* underlets for a year at the same rent to *C.*, who occupies during the whole year. In the middle of the year *B.* surrenders to *A.*, who accepts *C.* for his immediate tenant upon a new demise from year to year from *A.* to *C.* *C.* gains no settlement under 1 Will. 4, c. 18.

Seemle, that payment of rent by *A.* the vendee of the goods of *B.*, to prevent a distress for rent

due from *B.*, is a good payment of rent by *B.* within 1 Will. 4, c. 18.

UPON appeal, an order whereby the wife and children of *Francis Taylor* were removed from Farnborough to Banbury, was confirmed, subject to the opinion of this Court upon the following case:

A little before Lady-day, 1831, *Taylor* took a house in Banbury of *Joseph Ward* for one year, commencing at Lady-day, 1831, at the rent of 20*l.* *Ward* was himself a yearly tenant of the house, which he let to *Taylor*, under *William Cawley*, from Lady-day to Lady-day, at the same rent of 20*l.* *Taylor* entered into the house at Lady-day, 1831, and at Michaelmas, 1831, paid half a year's rent to *Ward*. Shortly after Michaelmas, 1831, it was verbally agreed between *Ward* and *Cawley* that *Ward's* tenancy under *Cawley* should be put an end to, and *Ward* released from further liability in respect of such tenancy; and afterwards it was verbally agreed between *Cawley* and *Taylor*, that *Cawley* should accept *Taylor* as his tenant of the premises from year to year, commencing from Michaelmas, 1831, at the same rent of 20*l.*, and upon the same terms in other respects as before. *Taylor* occupied the house without interruption, from the time of his entry at Lady-day, 1831, until shortly after Lady-day, 1832, when he went off to America without having paid any rent, except the half-year's rent paid to *Ward*. His wife and children were left by him in the house. One *Abbott* took to *Taylor's* furniture, and on the 24th September, 1832, sold a part of it and paid *Cawley* 10*l.*, the half-year's rent due at the Lady-day previous. This was done to avoid a distress, and without the authority of *Taylor*. *Taylor's* wife and children left the house between Lady-day and Michaelmas 1832.

The question for the Court is, whether *Taylor* gained a settlement in Banbury.

M. D. Hill and *R. Hayes*, in support of the order of sessions. The requisites of the statutes 6 *Geo.* 4, c. 57, and 1 *Will.* 4, c. 18, have been complied with. It is found that the pauper occupied a house under a yearly hiring, for twelve months. One half-year's rent was paid by him, and the other half out of the proceeds of his property. The only fair and useful construction of the stat. 1 *Will.* 4, is, that it requires that the rent shall be paid out of the pauper's funds. It may be contended that there was a surrender to *Cawley*. There was no surrender to satisfy the statute of frauds. Nothing more took place than a conversation between *Ward* and *Cawley*. It would be giving the statute a very limited and narrow construction to hold that the rent must actually be paid by the party hiring the tenement. [*Parke, J.* The objection here is, that the tenement must be occupied one whole year under *one* yearly hiring]. The object the legislature had in view in enacting the 6 *Geo.* 4, and 1 *Will.* 4, was, that no person should gain a settlement who was not trusted with a house of the value of 10*l.* yearly. In *Rex v. Tadcaster*(a) there was a hiring of two different tenements, yet the party was held to have gained a settlement. This case shews that this Court will put a liberal construction on the act of 1 *Will.* 4. The statutes upon this subject have been very loosely worded, and the Court has construed them liberally. By the 59 *Geo.* 3, c. 50, it was enacted that no person should gain a settlement by reason of his or her *dwelling* for forty days in any tenement rented by such person. It was held in *Rex v. North Collingham*(b), that a very liberal construction was to be put on that act. In *Rex v. Stow*(c) it was held, that an occupation might be connected so as to make an occupation for one whole year, within the meaning of 59 *Geo.* 3, c. 50. That is precisely this case, and the question then is, whether the 6 *Geo.* 4, which is followed by 1 *Will.* 4,

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rent.Surrender of
tenancy.Occupation
for a year un-
der one hiring.

(a) *Ante*, vol. i. 466; 4 *Barn. & Cressw.* 578.
Adol. 703.

(c) 6 *Dowl. & Ryl.* 110; 4 *Barn.*

(b) 2 *Dowl. & Ryl.* 743; 1 *Barn. & Cressw.* 87.

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has made any difference. [*Parke, J.* They have done that which the legislature intended to provide against. If it had been intended that the occupation and payment for the term should be sufficient, without reference to the hiring, it would have been easy to have said so]. The 6 *Geo. 4* leaves out the words "occupied by the party hiring the same," which are supplied by 1 *Will. 4*. If different hirings of different tenements may be connected, surely different hirings of the same tenement may. If having an interest in the premises for a year and being trusted by one person gains a settlement, much more should an interest for a year and a half, and credit given by two different landlords, be sufficient. If it be held otherwise, any modification of the tenancy will destroy the settlement. Suppose the landlord give his tenant notice to quit at the end of the year, and the tenant agrees to pay higher rent and continues in occupation, would he not gain a settlement? The word "such" in 1 *Will. 4*, c. 18, is a word of description, not of reference.

Surrender of
 tenancy.


Amos and Waddington, *contra*. There was a surrender by the pauper of his tenancy under *Ward*, and a new term taken by him from *Cawley*, and under neither of these hirings was there an occupation for a year. The pauper, therefore, did not gain a settlement. *Thomas v. Cook* (a) shows that what took place between the parties in this case amounted to a surrender. The inconvenience of that which was determined in *Rex v. Stow* (b) was felt by the legislature, and to remedy this the act of 6 *Geo. 4* was passed. In *Rex v. Stow*, *Abbott, C. J.*, says, "It has been contended, that the legislature must have meant the hiring, occupation, and payment to be for the same year. If that had been their intention, it would have been easy to say that the occupation and payment should be for *such* term." These latter words are inserted in 1 *Will. 4*. The intention of the legislature, in passing 1 *Will. 4*, was, that there should be

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 for a year un-
 der one hiring.

(a) 2 Barn. & Alders. 119.

(b) *Ante*, 293.

such an occupation of the tenement as could not be easily misrepresented. *Rex v. Tadcaster* and *Rex v. Ormesby* (a), are not within the mischief of the statute, and are clearly distinguishable from the present case. In *Rex v. Tadcaster* there was an occupation for a year under the yearly hiring, although the tenements were separate. In *Rex v. Ormesby* the tenements were taken at one time, and occupied for a year, although the period of holding each was different.

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LITLEDALE, J (b).—The 1 Will. 4, c. 18, after reciting the provisions of 6 Geo. 4, c. 57, enacts, “that no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, as in the said act expressed, unless such house or building, or land, shall be actually occupied under such yearly hiring in the same parish or township, by the person hiring the same for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same.” I am sorry to have recourse to refinements and subtleties in settlement cases, but I think we are bound to see whether the words of the legislature have been satisfied. There has been a hiring of a tenement in this case, and the question is, whether *Taylor* occupied the premises “under such yearly hiring.” This raises the question whether what took place between the parties amounted to a surrender of the term demised by *Ward* to *Taylor*. It appears to me that the arrangement did amount to a surrender, and that *Taylor* being tenant to *Ward* thereby became tenant to *Cawley*. Substantially it is the same as if *Ward*, being seised in fee, had conveyed to *Cawley*, and on a communication between the parties *Taylor* had surrendered his old term and taken a new term. Under the hiring by *Taylor* from *Cawley*, there was not an occupation for a year, and the act requires that the party should occupy under one hiring for a year. In *Rex v. Tad-*

(a) *Ante*, vol. i. 27.

(b) Lord Denman, C. J., was at the Privy Council.

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caster there was an occupation for a year of different tenements under several hirings. That case has, in my opinion, gone quite far enough.

PARKE, J.—I am of the same opinion; and I have not felt any doubt from the commencement of the argument. I do not, however, feel certain that we shall by this decision effect the intention of the legislature. The Court, in construing acts of parliament, has guided itself by this rule, to put such a construction upon the act as the words express, unless that construction would lead to some manifest absurdity or incongruity to be collected from the act. In *Rex v. Tadcaster*, to avoid an incongruity, the Court gave a latitude of construction to the act of 1 Will. 4. Probably we went as far as we ought to have gone in coming to that conclusion, and I am not prepared to go further. This case differs from that. In *Rex v. Tadcaster* there was a hiring of two tenements for the entire year, and each was occupied by the tenant for the full period of a year. The words of the statute were satisfied in other respects. In this case we should go further than the decision in *Rex v. Tadcaster*, if we were to hold that a settlement was gained, because we should decide that it was unnecessary to occupy the tenement for one whole year under the yearly hiring. The obvious meaning of the statute is, that there is to be a yearly hiring of the tenement, and an occupation for the term of one whole year under such hiring. If that construction be put upon the act no settlement is gained here. The surrender of the mesne landlord could not put an end to *Taylor's* tenancy. But what took place here enured as a surrender of the original term, and created a new tenancy for another year, under which the pauper occupied less than a year. The words of the statute, according to their ordinary meaning, have not been satisfied. I do not see any manifest absurdity in adhering to them.

PATTESON, J.—The rule of construction has been very correctly laid down by my brother *Parke*. I think the

words as plain as any words I ever read in my life. They are "occupied under such yearly hiring by the person hiring the same." There can be no doubt that the occupation must be under the *same* hiring, and for a year of the hiring. *Rex v. Stow* was decided expressly on the ground of the absence of the words that are inserted in this act. In *Rex v. Tadcaster* some violence was done to the words of the act, because it was held that the word "hiring" in the singular number might be considered as if it had been in the plural. I rather think also that in that case some violence was done to the intention of the legislature; yet if it was not distinguishable from this case I should hold myself bound by it. But I think it is clearly distinguishable, for the reasons which have already been given.

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Order of Sessions quashed.

The KING v. The Inhabitants of GWINEAR.

ON appeal, an order whereby *Philip Rule*, his wife and children, were removed from Gwinear to Camborne, in Cornwall, was confirmed, subject to the following case:

Rule the elder, the father of *Philip*, was, on the 1st day of June, 1789, duly bound by the parish officers of St. Erth to *Richard Tredinnick*, of the same parish, farmer, till twenty-one, as an apprentice in husbandry. The apprentice lived with his master some years in St. Erth, and served him in husbandry until he became reduced in circumstances and worked at the mines, employing his apprentice in the same work. The master then removed to the parish of Phillack, taking the apprentice with him.

A parish apprentice left his master and went to live with his father in another parish, working with his father in the same trade at which he had lately worked with his master. The master having claimed the apprentice, agreed with the father in May, to deliver up the indenture upon payment of four guineas in August. The apprentice continued with his father working at the same trade until August, when the indenture was delivered up and the money paid. Held, that there was at all events no dissolution of the apprenticeship until August (if then), and that the service by the apprentice with the father was referable to the indenture, and that the apprentice gained a settlement in the parish in which he resided with his father.

Whether a parish apprentice under age is capable of assenting to the cancellation of his indenture of apprenticeship, *quære*.

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Whilst there, and about two years before the expiration of the apprenticeship, a dispute having arisen between the mistress and the apprentice, the latter told his mistress that he would leave the place, and never return to it; and accordingly he left it immediately, without the consent of his master, and never returned, but went to live with his parents in Camborne, where they occupied a small cottage at 50s. a year, his father working as a labouring miner in Hirland mine. During the time the apprentice lived in Phillack, his master worked at this mine, where the apprentice worked with him; and after he had left his master he continued to work at the same mine under his father. *Tredinnick*, a few days after the apprentice had left him, found him working for his father in Hirland mine, and told his father that if he kept the apprentice, he (*Tredinnick*) would take up his wages. The father replied that he did not wish to keep the boy, but that he would not go back. It was then agreed that the boy should be given up to the father in consideration of four guineas, to be paid on the next mine pay day, for the ores on which the father and son were then working. The agreement was made in May, and the money was accordingly paid on the next mine pay day, on the 16th of August following, when the indenture was delivered up by *Tredinnick* to the father. From the time when the apprentice left *Tredinnick*, he, with his master's knowledge, lived in Camborne with his father, who received all the wages which he earned at the mine, supplying him with meat and clothes and other necessaries, in the same manner as he did the rest of his children who lived with him. After the apprentice became of age, he received his own wages, and the father then delivered up the indenture to him.

The question for the consideration of the Court is, whether the pauper was settled in Camborne.

Austin and *M. Praed*, in support of the order of sessions. The pauper's settlement was not in Camborne; for,

in the first place, the indenture was put an end to; and secondly, supposing that the indenture was not put an end to, there was no service under it.

I. The indenture was delivered up to the father; and *Rex v. St. Mary, Kallendar* (a) shews, that by the delivery of the indenture to the father, it is cancelled. *Rex v. Weddington* (b) is to the same effect. The test by which to ascertain whether the indenture is cancelled, according to *Rex v. Harberton* (c), is to consider whether the master can support an action, on the indenture, against the apprentice for not serving. It may be contended that as the money to be given to the master was not paid until August, the indenture continued in force until that period, and that consequently there was a service of forty days in Camborne under the apprenticeship. It is submitted, however, that the indenture was put an end to when the agreement was entered into.

II. Whether the indenture was put an end to or not, there was no service under it in Camborne. It was laid down in *Rex v. Linkinhorne* (d) that the service must be referable to the indenture and in furtherance of its object. The object of an apprenticeship is twofold—the teaching of the apprentice and the service of the master. The mode in which the pauper lived with his father is referable to neither of these objects. The pauper lived like the rest of the children, working in the mines. *Rex v. Banbury* (e) is distinguishable from the present case; for there the second master was of the same trade as that of the first at the time of the binding.

Crowder, contra. Here was either no dissolution of the apprenticeship, or if there was, it did not take place until the 16th of August, when there had been a residence of forty days under the apprenticeship.

(a) Burr. Sett. Cases, 274.

(b) Ibid. 766.

(c) 1 T. R. 139.

(d) 3 Barn. & Adol. 413.

(e) *Ante*, vol. ii. 105.

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 First point.

In *Rex v. Austrey* (a), it was held that an infant parish apprentice could not dissolve the apprenticeship with the consent of the master. In this case the boy could not, being an infant, consent to the dissolution. In *Rex v. Harberton* the apprentice, at the time of the dissolution, was of age. In *Rex v. Austrey*, the master, when the pauper was under age, agreed for forty shillings to discharge him from his apprenticeship. The pauper paid the money, and the indenture was delivered up to him. He then hired himself, and served a year as a servant in another parish. The Court held, that as the apprentice was under age, he could not give any valid consent; and as he could give no valid consent, his subsequent service could not be considered as performed by his master's leave. That is precisely this case.

Second point.

But, assuming that there was a dissolution, *that* did not take place until the 16th of August. The agreement was conditional only. If the sum agreed upon had not been paid, the apprentice could not have said that the contract of apprenticeship was avoided. Giving the agreement its utmost extent, it is clearly conditional, and the master preserved his control over the apprentice up to the 16th of August. *Rex v. Chipping Warden* (b) shews also that the service with the father may be considered as service under the indenture. *Rex v. Shebbear* (c) shews that if the consideration for dissolving the apprenticeship be not paid, it continues in force. The intention of the parties was not to dissolve the apprenticeship, but to transfer the indentures. This occurred *before* the 56 Geo. 3, c. 139. If the transaction had taken place after the 56 Geo. 3, it would have been necessary to have transferred the indenture in the particular manner directed by that act. Treating this as a case of a transfer of the apprentice, *Rex v. Linkshorne* and *Rex v. Banbury* do not apply. This comes

(a) Burr. Sett. Cases, 441.

(b) 3 T. R. 108.

(c) 1 East, 73.


within that class of cases in which the apprentice serves another master with the consent of the first. Upon this part of the case, *Rex v. Chipping Warden* is precisely in point. In *Rex v. Barleston* (a) a parish apprentice was assigned by his original master to J. S., by an instrument in writing, but there was no assent of two magistrates; and it was held, that though this was not a lawful assignment under 32 Geo. 3, c. 57, it was sufficient to shew the consent of the first master that the apprentice should serve J. S., and that consequently the service with J. S. was a good service under the indenture. It cannot be objected that the service under the father was not a service under the indenture, on account of the nature of the employment, as the original master had himself employed the apprentice in mining.

LITLEDALE, J. (b)—There was no dissolution of the contract of apprenticeship, at all events, before the month of August. All that occurred before is merely agreement. If the four pounds had not been paid, it was not the intention that the indenture should be given up. *Rex v. Chipping Warden* is in point. It is not very material to consider whether there was a dissolution afterwards. I have no doubt that in May the pauper was working with his father under the apprenticeship. He was originally bound to work in husbandry, but afterwards, the master's circumstances being reduced, he worked as a miner, and the apprentice worked with his master as such. His father worked at the same business. It appears to me, therefore, that up to the 16th August the son was working with the father under the indenture.

PARKE, J.—I doubt very much whether the parties ever contemplated any dissolution, and whether it was not intended that there should be a mere transfer. Supposing a

(a) 5 Barn. & Alders. 780.

(b) Lord Denman, C. J., was at the Privy Council.

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dissolution to have been intended, I question very much whether it was *competent* to the son and father to put an end to the indenture. It rather appears to me that it was not competent to them; and if that be so, the indenture could not have been put an end to. But, supposing that it was competent to them to do so, I am quite clear that the indenture was not put an end to till the money was paid according to the agreement. Until then I think the agreement was only executory. It was clearly not considered as operating on the indenture till the money was paid. Upon the first supposition, it is perfectly clear there was a residence up to August under the indenture; and supposing that there was a dissolution in August, there was sufficient residence to gain a settlement before that time. The pauper had worked at the mine for his master, and then proceeded to work there for his father. It seems to be implied in the agreement that he is to continue to work in the same way as he had done for his master. A settlement, I therefore think, was gained.

PATTESON, J.—I am of opinion that there was a service between May and August under the indenture, whilst the boy was living with his father. If the money had not been paid, the master might have compelled the boy to return. I do not think it was the intention to put an end to the indentures. *Rex v. Harberton* would appear at first sight to favour the supposition that an infant parish apprentice *may* put an end to the apprenticeship; but upon looking into the case, it appears that the apprentice left his master within a month of twenty-one, and returned seven months after, and *then* procured the receipt; so that he was of age when the agreement was made. In this case, when the agreement was made the apprentice was not of age.

Order of Sessions quashed.



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The KING v. The Inhabitants of GOSFORTH.

TWO justices removed *Ann Birkett* from Whitehaven to Gosforth. On appeal, the Cumberland sessions confirmed the order of removal, subject to the following case :

The pauper's father having previously acquired a settlement in Gosforth, in the year 1823, (after the passing of the 59th *Geo. 3*, c. 50, but before the 6th *Geo. 4*, c. 57,) whilst the pauper remained with him as a part of his family and unemancipated, hired for a year, of a Mr. *Falcon*, a dwelling-house in Whitehaven, at the yearly rent, and of the yearly value of 8*l.*; and he also hired for the same year, of a Mr. *Grayson*, a stable also in Whitehaven, at the rent and of the value of 6*l.* 6*s.* This stable was not under the same roof with the dwelling-house, nor contiguous or appurtenant to it, but it stood in a different street, upwards of 200 yards off. He held and occupied both the dwelling-house and the stable for the whole year, and paid the whole year's rent for them

Between the passing of 59 *Geo. 3*, c. 50, and 6 *Geo. 4*, c. 57, *A.* rented for a year, of *B.* a dwelling-house, and of *C.* a stable, at the respective rents of 8*l.* and 6*l.* 6*s.*, both in the same parish, but unconnected. *A.* occupied, and paid the year's rent for, both: Held, that *A.* gained a settlement by such occupation.

The question for the opinion of the Court is, whether by this occupation the pauper's father gained a settlement in Whitehaven.

Coltman, who was to have argued in support of the order of sessions, admitted that this case could not be distinguished from that of *Rex v. Tadcaster* (*a*), and that, according to the decision in that case, the pauper's father had gained a settlement in Whitehaven.

The Court quashed the order of sessions.

Order of Sessions quashed.

(*a*) *Ante*, vol. i. p. 466.

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A. for two successive years was hired by *B.* as a farm servant from a few days after Michaelmas day until the Michaelmas day following, at a certain amount of wages for the whole time. A few days after the Michaelmas day on which the second hiring expired, *B.* paid *A.* the wages agreed upon, and asked him if he chose to go on with him, to which *A.* replied "Yes." Held, that this conversation was not evidence of a yearly hiring, so that a service under it might be connected with the antecedent service.

The KING v. The Inhabitants of the Parish of ARDINGTON.

UPON appeal, an order for the removal of *George Barrett*, his wife and children, from Ardington, Berkshire, to Aldbourne, Wiltshire, was quashed, subject to the following case :

About three or four days after Michaelmas, 1823, *G. Barrett* was hired by his father to *Brown*, a farmer in Little Hinton, to serve him as shepherd until the following Michaelmas-day, for his board and lodging, and 5*l.* wages. The father also hired himself at 6*s.* a week wages. *G. Barrett* served under that hiring, boarding and sleeping in *Brown's* house at Little Hinton, till Michaelmas, 1824. On that day *G. Barrett* went by his father's permission to Hipworth fair for pleasure, and returned in the evening to his master's house. Four or five days after Michaelmas, 1824, *Brown* paid to the father the wages due to himself and his son ; and on the same day *Brown* hired the father, and *G. Barrett* and his brother, until Michaelmas following, at 6*s.* a week for the father, and 5*l.* 10*s.* a year for each of the sons. They all continued in the service of *Brown* until Michaelmas 1825, boarding and lodging in *Brown's* house. A few days after Michaelmas, 1825, the master again paid the father the wages agreed upon at the last hiring, and asked the father if he and his sons chose to go on with him, to which the father answered, "Yes." The wages were to be the same. *G. Barrett* remained at his master's house, boarding and lodging there, and working on the farm as usual, until the beginning of April, with the exception of a part of March, during which he was with sheep of his master's on a farm in another parish. The master, at the beginning of April, paid *G. Barrett's* wages, due at Lady-day, 1826, to his father, and then quitted Little Hinton. *G. Barrett* boarded and lodged with *Brown* at Little Hinton, and was employed on his farm as shepherd continually from three or four days after Michaelmas, 1823, to a few days after Lady-day, 1826. The father received the wages of himself and

G. Barrett from *Brown*, without accounting for them to the latter, whom, however, he found in clothes and pocket money. *G. Barrett* might have left his master's service at Old Michaelmas, 1824, but remained in it. He did not know what wages he was to receive.

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The sessions held that a yearly hiring of *G. Barrett* by *Brown*, in Little Hinton, must be implied, and quashed the order of removal.

The question for the opinion of the Court is, whether or not *George Barrett* gained a settlement by hiring and service in Little Hinton?

Carrington and *Tyrwhitt*, in support of the order of sessions. The conversation which passed at Michaelmas, 1825, was evidence of a general hiring for an indefinite time; and any service under that hiring might be connected with the former service. *Rex v. Macclesfield (a)* is not so strong as the present case. There the previous hiring was for 11 months only; whereas here it was for a year, wanting only three or four days. If there be any evidence of a general hiring, the Court will support the order of sessions, although there may not be enough to satisfy the Court, if they were sitting as a Court of Quarter Sessions; and it is a well-established rule, that the Court presumes a hiring for a year from words of hiring, unless there be in the words any thing to repel the presumption. There is nothing here to repel the presumption; *Rex v. Crocombe (b)*, *Rex v. Ape-ihorpe (c)*. [*Patteson, J.* The wages are to be the same as for the previous hiring for less than a year.]

LORD DENMAN, C. J.—It is difficult to see how the master could have done better to avoid a yearly hiring, and consequent settlement. When the pauper's father answered "Yes," to the master's inquiry whether he chose to go on

(a) 3 T. R. 76.

(b) Burr. S. C. 256.

(c) 2 Barn. & Cress. 892; 4 Dowl. & Ryl. 487.

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with him, it must necessarily be taken to mean that they consented to go on as they had gone on before. The sessions seem to have thought that by some rule of law they were bound to imply a yearly hiring. They do not state that they believe that there was such a hiring. The question they ask us is, whether the pauper gained a settlement? I have no doubt in answering that he did not.

LITLEDALE, J.—This is a very clear case. At Michaelmas, 1825, a conversation took place, in which the master asked the pauper's father whether he and his sons chose to go on. What does that mean? It means going on till the following Michaelmas in the same manner as was agreed on upon former occasions. The hiring had no reference back.

PATTESON, J.—I have not the least doubt upon the case. The parties here intended to avoid a yearly hiring, for the purpose that no settlement should be gained.

WILLIAMS, J., concurred.

Order of Sessions quashed —

The KING v. The Inhabitants of NEWTOWN, MONTGOMERYSHIRE.

J. S. agreed with a flannel manufacturer for 12 months, to learn the art of weaving flannel, he receiving one-half of what he earned, and finding himself in meat, drink, and lodging, and the master to have the other half for teaching him: Held a defective contract of apprenticeship, and not a contract of hiring and service.

AN order, by which *John Stanley*, his wife and children, were removed from Newtown to Berriew, both in Montgomeryshire, was quashed upon appeal, subject to the following case.


In 1818, *Stanley* acquired a settlement as a servant in husbandry in Berriew. On leaving that service, being of

he earned, and finding himself in meat, drink, and lodging, and the master to have the other half for teaching him: Held a defective contract of apprenticeship, and not a contract of hiring and service.

age and unmarried, he entered into a parol agreement with *Williams*, a master flannel manufacturer in Newtown, for three years, to learn the art of weaving flannels. It was agreed that he should be paid by *Williams* one half of what he could earn, and should find himself meat, drink, clothes, washing, and lodging, and that *Williams* should have the other half for teaching. *Stanley* thereupon went to *Williams* and remained in his employ six weeks, during the first four of which he wove for him one piece, and during the last two of which he wove another piece of flannel. *Stanley* then left *Williams* by consent, and applied to *Evans*, another master flannel manufacturer in Newtown, to take him on the same terms, informing him of his having left *Williams*, and what the contract with him was, and how he had been employed by him. He particularly told *Evans* that he had been employed to make stays, and could throw the shuttle, but had had bad stays to work with. Upon which *Evans* said, that his having had bad stays to weave with would improve him, and as to throwing the shuttle, it was no more than a tailor's threading his needle. *Evans* then said he would take him on the same terms as those upon which he had been with *Williams*, but for twelve months only; adding, that twelve months would be long enough if he was a good boy. *Stanley* agreed to go to *Evans* for twelve months to learn the art of weaving, and *Evans* engaged to teach and to give him half of his earnings. *Stanley* immediately went to *Evans*, and continued to weave flannels in his master's room, from his master's materials, and with his loom, to the end of the year, on these terms. *Stanley* could not leave the service, or be turned away during the twelve months, and was paid by his master one half of what he earned, and his master kept the other half for teaching him the trade. *Stanley* found himself meat, drink, clothes, washing, and lodging, and lodged during the above time with his mother in Newtown. After his time was up, *Stanley* began to weave by the piece, and then he had all he earned, like other workmen.

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J. H. Lloyd and Cowling, in support of the order of sessions. The question is, whether the contract is to be considered as a contract of hiring and service, or a defective contract of apprenticeship. The sessions have, by quashing the order, in effect found that it was a contract of hiring and service. It must be admitted that the rule laid down in the modern cases, particularly in *Rex v. Crediton* (a), that "where teaching and learning are the principal objects of the parties, though there was a service, the contract is considered to be one of apprenticeship" (b), has created some difficulty in supporting the decision of the sessions, and it may be questioned how far the older authorities are now to be relied upon. The sessions, by sending to the Court the several facts, have evidently intended that the Court should not confine its view to the mere words of the contract. Almost every fact is in favour of a contract of hiring. *Stanley* was grown up, and had already gained a settlement: he contracted for a year; there was no premium or indenture, nor was there any parent or other party taking a part in the contract; he could not leave his master, so that if the master could not supply him with weaving, he must have been employed upon something else. The contract is to be considered as applied to the facts under which it was entered into, and then there is ground for saying that the real though not ostensible intention of the parties, was to enter into a contract of hiring and service. The pauper found himself in meat &c., which is scarcely consistent with a contract of apprenticeship, where the master always supplies them. *Rex v. Little Bolton* (c) is much stronger than the present case. *Rex v. Eccleston* (d) is directly in point, and has never been overruled, but was confirmed in *Rex v. Burbach* (e). [*Patteson, J.* The cases seem to have gone on in one course up to *Rex v. Bilborough* (f), after which there appears to have been a change in the leaning of the

(a) 2 Barn. & Ad. 493.

(b) Per *Taunton, J.*, ib. 497.

(c) Cald. 367.

(d) 2 East, 298.

(e) 1 M. & S. 370.

(f) 1 B. & A. 115.

Court. That case is supposed to have laid down the correct principle, though Lord *Ellenborough* there relied on the absence of a contract to serve on the part of the pauper.] It is still a question of *fact* for the sessions, and the Court will not overrule their decision, if there were *any* grounds for the conclusion to which they have come. If the Court are not satisfied, perhaps the better course would be to send the case back to be restated. But in addition, according to the language of the Court in *Rex v. Combe* (a), in order to make this a defective contract of apprenticeship, learning and teaching must be the sole, and not merely the primary, object of the parties. Here, it could not be the ~~sole~~ object, for it appears that the pauper had improved under his first employer *Williams*; his services were therefore valuable to the second master, and it is expressly stated that he was to be *paid* for them. In *Rex v. Crediton* the sessions found the contract to be one of apprenticeship, and the Court only decided that they would not overrule that finding. So here, the sessions having found the contrary, the Court will not overrule it, unless there is no foundation whatever for it.


N. R. Clarke, contra. The sessions have pro forma quashed the order of removal, stating the facts from which they came to the conclusion that this was a contract of hiring and service, in order that this Court may determine whether the premises warrant the conclusion. It would be idle to send a case for the opinion of this Court, if the quashing of the order is to exclude the consideration of the circumstances stated in the case. In *Rex v. St. Margaret's, Lynn* (b), the sessions found the contract to be one of hiring and service, but stated the facts from which the conclusion was drawn; and this Court quashed the order of sessions, as the facts stated did not warrant the

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(a) 2 Mann. & Ryl. 30; 8
Barn. & Cressw. 86.

(b) 9 Dowl. & Ryl. 160; 6 Barn.
& Cressw. 97.

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conclusion. Whatever fluctuation there may have been in the law upon the subject, it is now clearly settled that where the substantial object of the contract is the teaching of the pauper, and not the service of the master, the contract is to be considered a defective apprenticeship, and not one of hiring and service; *Rex v. St. Margaret's, Lynn*, *Rex v. Combe (a)*, *Rex v. Edingale (b)*. This is distinctly laid down in the last case by *Bayley, J.* In the present case, not only the substantial object, but the only object was the instruction of the pauper. The second master takes the pauper for a period of twelve months only, because that would be sufficient time for the pauper to learn the business. The finding of the sessions, that the pauper could not leave the service during the twelve months, amounts to nothing, since this Court will put their interpretation upon the terms of the contract as stated.

LITLEDALE, J. (c).—There are certainly conflicting authorities amongst the older cases, and there has been some undulation of opinion upon the law on this subject. But we are bound by the last decisions. *Rex v. Crediton* is much like this case, and is even somewhat stronger. There, the pauper provided his own board and lodging. This differs from *Rex v. Eccleston*. There, the pauper was to have half his earnings and to find himself in everything; here, the master is to have the half for teaching the pauper. The pauper, in this case, expressly goes to learn the art of weaving flannel. This second master was to take him upon the same terms as he had been with his former master, but for twelve months only, as that would be long enough if he was a good boy;—that is, long enough to learn the art of weaving. The language of the agreement appears clearly to contemplate that the one was to teach,


(a) *Ante*, 309.

(b) 10 Barn. & Cress. 739.

(c) Lord Denman, C. J. had

left the Court during the argument
 to be present at the Privy Council.

and the other to learn; and it seems to me, that the master could not have employed him in any other way than in weaving flannels. There is no part of the agreement from which a general contract of hiring can be inferred. Learning was not only the primary, but the *whole* object of the contract. I am of opinion that this was a defective contract of apprenticeship, and that therefore no settlement was acquired.

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PATTESON, J.—I cannot distinguish this case from *Rex v. Crediton*, and I feel bound to decide it by that authority. I confess also that I cannot distinguish it from *Rex v. Burbach*, but I must take it that *Rex v. Crediton* overruled *Rex v. Burbach*. Lord Ellenborough, in *Rex v. Bilborough*, made a distinction between that case and *Rex v. Burbach*. His lordship said, “In this case, the pauper never contracted to serve the master; the only agreement was, that the master should teach the pauper for a year. In *Rex v. Burbach*, there was an agreement to *work* for two years.” But I am quite unable to reconcile the two cases. Without going through the cases which have been decided since *Rex v. Bilborough*, the current of the authorities has been to hold contracts of this sort as defective apprenticeships. I think we must go with the current, and it is clear, according to the later authorities, and particularly the last case, that this is a defective contract of apprenticeship.

WILLIAMS, J.—I quite agree with the observation of Lawrence, J. in *Rex v. Eccleston*, that it is of infinite consequence that what has been once expressly determined should be adhered to. I concur with the rest of the Court in thinking that the authorities go to shew a tendency to decide that agreements such as this are not contracts of hiring and service, but imperfect contracts of apprenticeship. Without entering into the question, whether the Courts have departed from the law as laid down in *Rex v. Eccleston* and *Rex v. Little Bolton*, I think *Rex v.*

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Crediton and the present case are not in substance distinguishable; and that being the last case decided, we ought to abide by it.

Order of Sessions quashed.

The KING v. The Inhabitants of WOOTTON.

Under 6 Geo. 4, c. 57, a party gained a settlement who rented two dwelling houses in different parts of the same parish for a year, at yearly rents of less than 10*l.* each, but together exceeding that amount, although he only occupied one himself and underlet the other.

The words "separate and distinct" in 59 Geo. 3, c. 50, 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, operate to exclude an occupation of one tenement jointly with another person, and not with another house, &c.

UPON appeal, an order for the removal of *Robert Hall*, his wife and children, from Wootton, Berkshire, to Saint Mary the More, in Wallingford, in the same county, was quashed by the sessions, subject to the following case:

Hall being legally settled in Saint Mary the More, in Wallingford, in 1800, became tenant to one *Margetts*, of a cottage in Wootton, at the yearly rent of 8*l.*, and resided in it with his family until February, 1832. This cottage was held under *Margetts* until it was sold with other cottages to one *Harris*, some time before April, 1827. From that time it was held by *Hall* under *Harris*, at the same rent. In the same April, a son-in-law of *Hall* applied to *Harris* to let to him another cottage, in a different part of Wootton. *Harris* however declined accepting him as tenant, but agreed to let it to *Hall* at 5*l.* a year. *Hall* never occupied this cottage, but on the same day, he let it at the same rent to his son-in-law, who immediately took possession of it, and resided in it for about three years, when he quitted it. Upon his quitting, the possession was forthwith given to and accepted by *Harris*. The son-in-law paid his rent to *Hall*. *Hall* paid the rent for both the cottages to *Harris*, who gave a receipt for the amount, 13*l.* 17*s.* 6*d.*, stating that such sum was paid by *Hall* for one year's rent of the two cottages.

The question for the opinion of the Court is, whether *Hall* was settled in Wootton.

Sir J. Scarlett, in support of the order of sessions. A

settlement was gained by *Hall* under 6 *Geo.* 4, c. 57. The act of 1 *Will.* 4, c. 18, which requires that the tenement shall be *actually occupied* under a yearly hiring *by the party hiring the same*, was not passed until the year 1831, and is retrospective only. Under the old acts it is clear that the pauper would gain a settlement. *Rex v. Iver* (a), decided at last Hilary term, is precisely in point.

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Cooper, contra. It has certainly been decided by *Rex v. Ruthin* (b), that the second clause only of 1 *Will.* 4, c. 18, is retrospective. *Rex v. Iver* is certainly very nearly this case, but the Court will now say whether or not it decides conclusively, that in every case where a party underlet a distinct dwelling-house, the rent might, under the old acts, be added to that of a dwelling-house occupied by himself, in order to make up the requisite amount of 10*l.* There is this distinction between *Rex v. Iver* and the present case, that there the two tenements stood close together, forming in fact one building; whereas here, the house underlet to the son-in-law was situate in a different part of Wootton. The circumstance of the houses adjoining one another, formed, it is believed, a material ground of the decision. Great violence would be done to the language of 6 *Geo.* 4, c. 57, by holding that a party could gain a settlement by renting *two dwelling-houses*, perfectly distinct, and underletting one of them in the manner done here. This case goes further than any cases hitherto decided.

LITTLEDALE, J. (c)—It seems to me that the pauper acquired a settlement. This is nearly the same case as *Rex v. Iver*. Independently, however, of that case, and looking only to the act, I think it is not to be confined to a single dwelling-house. The 59 *Geo.* 3, c. 50, requires that the tenement shall consist of a distinct dwelling-house or building, or of land, or of both. That provision of 59 *Geo.* 3

(a) *Ante*, 28.
 (b) *Ante*, vol. ii. 97.

(c) Lord Denman, C. J. was absent, being at the Privy Council.

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is continued by 6 *Geo.* 4, and also by the late act of 1 *Will.* 4. Mr. *Cooper* contends that this must mean a single dwelling-house. The meaning of the act is, that the tenement must consist of land or building, and not of what were once considered tenements, such as tithes. It must be such as is properly the subject of *occupation* (a). The words of the act are, "house, building, or land, or both." Now "*both*" does not correctly apply to all the *three* preceding descriptions of tenements, from which I infer that dwelling-house and building were intended to form one class, and land another. All that the act means is, that the tenement is to be either building or land, or both; if that is the case, it is quite immaterial whether there are several houses, several buildings, or several pieces of land, or whether there is one of each kind of tenement. The act is not to be considered as having narrowed the subject-matter of occupation. The object was to exclude everything but what was capable of being *occupied*.

PATTESON, J.—This case certainly has not yet been decided, because in all former cases the whole was under one roof. If we had decided there that houses unconnected might be joined for the purposes of settlements, we should have been told that it was extra-judicial, and that it did not go on the ground that they were different houses, but on the ground that they were close together under the same roof. Therefore we were obliged to confine it to that ground. This case goes further. I have always thought that the meaning of that clause of the acts, which requires that the party shall occupy a *separate and distinct* dwelling-house or building, or land, was, that he must occupy a house separately and distinctly from all other *persons*, and not occupy rooms or apartments in a house which is also inhabited by others. It is not necessary that there should be a distinct dwelling-house of the value of 10*l.*, if there are other buildings or land in the same parish which make up the value.

(a) Vide *Chanter v. Glabb*, 4 *Man. & Ry.* 334; 9 *Barn. & Cresw.* 479.

WILLIAMS, J.—The statutes are to be construed together. The 59 *Geo. 3*, c. 50, was introduced to prevent controversies that arose as to what was a tenement, which perplexed the sessions a long time. Infinite litigation was occasioned owing to the vast variety of items which might be thrown in to make up the requisite amount. In order to get rid of this source of litigation, the 59 *Geo. 3*, c. 50, was introduced, and that act has excluded all other species of tenement, except buildings and land. As, however, it was felt to be mischievous to allow settlements in respect of the occupations of *portions* of dwelling-houses, the act of 6 *Geo. 4*, c. 57, was passed for the purpose of avoiding that difficulty. I have now no doubt but that the meaning of this act is, that the tenement which was to confer a settlement, should be the subject of an entire holding, and not a split holding. That being so on the present occasion, we have two things which compose the tenement, both of which things are within the express words of the act.

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Order of Sessions confirmed.

WINTER v. ELLIOTT.

THE plaintiff having obtained a verdict with 1s. damage, in an action for an assault, the defendant was, on the 2d March, 1833, charged in execution at the suit of the plaintiff for the damage and costs, and had ever since been detained in the gaol of Durham, in execution of the plaintiff's judgment. On the 29th March, 1834, the defendant gave notice of his intention to apply, upon an affidavit stating the above facts, on the first day of Easter term, to be discharged from the custody of the sheriff of Durham, as to the plaintiff's action, according to the form of the statute, he having lain in prison for the space of twelve calendar months in execution upon a judgment for

A party charged in execution for damages recovered in an action for an assault, is within the purview of the act of 48 *Geo. 3*, c. 123, "for the discharge of debtors in execution for small debts, from imprisonment in certain cases."

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damages not exceeding 20*l.* exclusive of costs. *Knowles* having in the Bail Court before *Taunton*, J. on this day obtained a rule for the defendant's discharge,

Grainger (with consent) applied to open the rule. It is submitted, that this is not a case within the act, the action having been for an assault; whereas it would appear that the act of 48 *Geo.* 3, c. 123, under which this discharge has been applied for, extends only to executions in actions arising ex contractu. The words are, "all persons in execution upon any judgment for any *debt* or *damages* not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment," &c. The word "*damages*" seems to be intended to apply only to the case of damages in assumpsit; for throughout the whole of the remainder of the act, the word "*debt*" only is used. The legislature may well have intended to relieve poor *debtors*, yet not persons who are charged in execution for damages in a case of assault.

Knowles, contra, was stopped.

Per Curiam.—We have no doubt that the act does apply.

Rule absolute.

HALL v. BOOTH.

A private person cannot apprehend another, upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief. **TRESPASS** for assaulting, seizing, and laying hold of the plaintiff, and forcing and compelling him to go to a pawnbroker's shop, and having kept and detained him there for a long time, and forced and compelled him to go to a police station-house, and searching and damaging the clothes of the plaintiff, and taking away from him divers papers belonging to him, and imprisoning him and detaining him in prison, without reasonable or probable cause.

Pleas: first, the general issue; secondly, a justification of the assaulting &c., and compelling the plaintiff to go to the pawnbroker's shop and there detaining him; that before the time when &c., a certain gun had been and was feloniously stolen, and taken and carried away from and out of the possession of the defendant, by some person or persons to the defendant unknown; and afterwards and before the time when &c., the said gun or fowling-piece was discovered in the pawnbroker's shop, and to have been there pawned by some person to the said defendant unknown; and the person so pawning the same had afterwards and before the said time when &c. been traced to a house wherein the plaintiff just before the said time when &c. resided, and that the said person who had so pawned the said gun bore a strong resemblance to the plaintiff; and the plaintiff just before the time when &c., in the declaration mentioned, had come from and out of the said house, where the said person unknown had been so traced to as aforesaid, and then ran off with great speed from the said house, to a certain public-house, wherefore he the defendant having *reasonable and probable cause for suspecting, and actually suspecting*, the plaintiff to have been guilty of and concerned in the feloniously stealing, taking, and carrying away of the said gun, did at the time when &c., in the declaration mentioned, with the assistance of a certain policeman, jointly lay hands on the said plaintiff, and assaulted him the plaintiff, and seized and laid hold of him, in order to carry and convey, and did carry and convey him the plaintiff to the said pawnbroker's shop in the declaration mentioned, for the purpose of ascertaining if the plaintiff was the person who had pawned the gun as aforesaid, and there kept and detained the plaintiff for a reasonable time in that behalf, as it was lawful for the defendant to do for the cause aforesaid, using no unnecessary violence and doing no unnecessary damage to the plaintiff on the occasion aforesaid.

General demurrer, and joinder.

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Gunning, in support of the demurrer. The plea is bad. In *Selwyn's Nisi Prius* (a) it is said, "Where a private person apprehends another on suspicion of felony, he does it at his peril, and is liable to an action, unless he can establish in proof that the party has actually been guilty of a felony. Proof of mere suspicion will not bar the action (for false imprisonment), although it may be given in evidence in mitigation of damages. And the plea justifying an arrest by a private person on suspicion of felony, must shew the circumstances from which the Court may judge whether the suspicion was reasonable." For the first of the propositions, it is true that Mr. *Selwyn* cites a MS. case of *Adams v. Moore*, which is omitted in a later edition of his work; but for the last proposition he cites the case of *Mure v. Kaye* (b), in which the Court decided to that effect. Here, no reasonable or probable cause for suspecting the plaintiff to have stolen the gun is stated in the plea. Whether sufficient cause is stated on the plea is a question for the Court, but the same degree of evidence is necessary to be stated as would be sufficient to satisfy the jury at nisi prius. All the facts necessary to shew that there was reasonable and probable cause must appear on the plea. There is not enough stated here to satisfy a jury. It does not appear when the party was traced to the plaintiff's house, whether before or after the theft. That the thief, or supposed thief, resembled the plaintiff, and that the plaintiff came out of the house to which the supposed thief had been traced, and ran violently from such house to a public-house, formed no reasonable and probable cause for apprehending the plaintiff on suspicion of felony. There certainly are cases which shew that a constable may arrest on suspicion, where no felony has been committed; but the circumstance of the defendant, in this instance, seizing the plaintiff with the assistance of a policeman, can make no difference, as the policeman was set in motion by the defend-

(a) Seventh edition, page 911.

(b) 4 Taunt. 34.

mt; *Hedges v. Chapman* (a). [*Cresswell*. I do not rely on the presence of the policeman.] It does not appear that the defendant apprehended the plaintiff for any purpose for which he was justified in apprehending him. It appears to have been for the purpose of ascertaining whether the plaintiff was the person who had stolen the gun.

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Cresswell, contra. This objection does not seem to be ground of general demurrer. [*Denman*, C. J. It is of the very essence of the defendant's justification.] A party may take another to the place where the theft was committed, in order to inquire. [*Denman*, C. J. You may go to inquire, but you cannot take him.]

Per CURIAM—

Leave to amend upon payment of costs.

(a) 2 Bingh. 523.

HEYDON v. THOMPSON, Gent., one &c.

ASSUMPSIT upon a bill of exchange. The declaration and plea, and the replication by way of new assignment, are set out *ante*, vol. ii. 403 (a). The defendant pleaded to the

The right of action upon a bill of exchange accepted for value, may be transferred by indorsement,

(a) And in the judgment of which his lordship gives an abstract of the pleadings.

without value, as by way of gift.

In an action by *B.* indorsee, against *C.* acceptor, *C.* pleads that the acceptance was obtained from him without consideration by the fraud of *A.* the drawer, and was indorsed to *B.* without consideration, and with notice of the fraud and of the want of consideration as between *A.* and *C.*

Scilicet, that *B.* may reply, merely traversing the fraud.

If however *B.* newly assigns a different bill, accepted generally, and the defendant pleads as before, omitting the statement of the original want of consideration, a replication to such plea, merely traversing the fraud, is sufficient.

The circumstances of fraud stated in the plea being that the defendant wrote his name and a qualified acceptance on a blank piece of stamped paper, and delivered it to the drawer for the purpose of his drawing thereon a bill payable at nine months, but that the drawer drew upon such paper a bill payable at six months,—the Court held that a replication merely denying that the defendant wrote his name or a qualified acceptance on a blank piece of stamped paper, in manner and form, &c., sufficiently put in issue the whole fraud.

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new assignment a plea similar to that which he had pleaded to the declaration, omitting only the statement that the acceptance was given for the accommodation of *Eldred*, and without any consideration. To this plea to the new assignment, the plaintiff now (pursuant to leave given to amend) replied, "that the defendant did not write his name and qualified acceptance, according to the form of the statute, upon the said piece of blank paper having a *Ss. 6d.* stamp thereon, as in the plea of the defendant by him above pleaded to the plea of the plaintiff, by him above pleaded by way of new assignment and replication to the said plea of the defendant first above pleaded, is mentioned, in manner and form as the defendant hath above in his plea in that behalf alleged. And this he prays may be inquired of by the country." General demurrer, and joinder.

Mansel in support of the demurrer. It is not necessary on the part of the defendant to enter into the question whether the plea is double or treble, but it is sufficient to show that it contains matters unanswered by the plaintiff, which amount to a good defence. In *Spilsbury v. Micklethwaite* (a), Sir James Mansfield, C. J. observes, "If a plea of justification to an action of this sort (assault and battery), consists of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification, if one of these facts be found by the jury." Where a plea is bad for duplicity, the plaintiff must demur: If he pass it over, it will be as if there were two pleas, only one of which is answered; *Bolton v. Cannon* (b). In this plea there are two answers to the new assignment; first, that upon which the issue is tendered, namely, that the acceptance was qualified; and secondly, that the bill was accepted with the intention that it should be drawn payable at nine months; whereas it was made payable in six months, which fact, if shewn to have been within the knowledge of the plaintiff at the time when

(a) 1 Taunt. 146.

(b) 1 Ventr. 271.

the bill was indorsed to him, is an answer to the action. If the defendant, instead of demurring, had added the similiter to this replication, and the cause had gone down to trial upon the issue raised, the action could not have been disposed of. The language of 4 Ann. c. 16, s. 1, is, that where any demurrer (the causes of which are not specially assigned) is joined, the judges shall proceed to give judgment according as the very right of the cause and matter in law shall appear to them, *so as sufficient matter appear in the pleadings*, upon which the Court may give judgment according to the very right of the cause. In *Stephen on Pleading* (a), it is said to be a rule, that "every pleading must be an answer to the whole of what is adversely alleged."

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Erle, contra. The Court intimated on a former occasion, that the best course would be to deny the plea altogether. The plaintiff would have pleaded in answer to all the matters, but this being an action of assumpsit, and there being no general form of replication in actions ex contractu as in actions ex delicto, in which the plaintiff may reply de injuriâ, it was necessary for the plaintiff to select some one material fact in the plea. Being unable to put in issue all, he takes that which may be considered as the foundation stone, viz., the acceptance upon a blank piece of paper. The plaintiff, by replying that there was no acceptance, denies in effect the whole defence. [*Littledale, J.* I do not see that you have put in issue the acceptance. The defendant says he accepted in a particular way, and you deny that he accepted in that manner.] The whole plea must be taken as a connected story. If the defendant never wrote his name and qualified acceptance on a blank piece of paper, he could not have delivered it to *Eldred* for the purpose of his drawing thereon a bill for 50*l.* payable in nine months after date, nor could *Eldred* have drawn, as appli-

(a) 2nd ed. 253i

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PATTESON, J.—I think that if this replication had been pleaded to the original plea, it would have been good; but it is not necessary to go that length. Here it is very clear to me that the plaintiff is entitled to our judgment. The declaration is on a bill of exchange generally. The defendant answers by setting up fraud on the part of the drawer, in drawing upon the blank acceptance a bill payable at six instead of nine months, and also want of consideration; and in order to meet the answer that a *bonâ fide* holder might sue upon the bill notwithstanding the original defects, he goes on to say that both the indorsers knew what had occurred in connection with the bill. The replication does not deny the facts, but says that the action is brought upon another and a different bill. The defendant, in his plea to this replication by way of new assignment, puts his defence upon the ground that this was a case of fraud, and not upon the ground of the want of consideration. The plaintiff having again newly assigned, the Court, upon demurrer, thought the second new assignment bad, but gave leave to amend. The plaintiff now, instead of newly assigning, replies that the defendant did not write his name and qualified acceptance on the piece of blank paper, as in the plea pleaded. By this replication he takes issue upon the very origin of the alleged fraud. In order to ground the objection of Mr. *Mansel*, it must be shewn that, supposing the matter denied by the replication were struck out of the plea, there is enough left upon the record to constitute an answer to the action. Now, what is left? Nothing but the assertion that *Eldred*, the drawer—that is, the drawer of the bill stated in the declaration,—indorsed, without consideration, to *Silver*, who also, without consideration, indorsed to the plaintiff. That is no answer; for the bill must be taken to have been drawn and accepted for good consideration. The drawer of a bill, drawn upon good consideration, may make a gift of it. The want of consideration between indorser and indorsee is, by itself,

me that the replication denies that the bill upon which the plaintiff claims to recover is a paper to which any part of the description in the plea applies. I cannot discover why the defendant might not very well have gone to trial upon the issue tendered by the replication, and have proved that the paper upon which the plaintiff has declared, and which he has new-assigned, is the paper to which all the facts alleged in the plea apply.

Mr. *Mansel* has answered the argument as to duplicity in pleading, by reference to the case in *Ventris* (a).

LITLEDAL, J. (having gone through the pleadings, proceeded thus :)—The plaintiff therefore says, by way of new assignment, "All that you allege in your plea may be true, but the bill of exchange upon which I bring my action is a different bill, and is a bill accepted by you generally." The defendant might have taken issue upon this; but instead of doing so, he, by way of making a special answer to the new assignment, states this history. He says, "No; it was not accepted by me generally; but I gave a qualified acceptance only, upon a piece of blank paper, and delivered the paper with this qualified acceptance for the purpose that a bill might be drawn upon it in a particular way, and it was not drawn in the manner intended." The plaintiff replies that he did not write a qualified acceptance on a piece of blank paper. This appears to me completely to put in issue the matters alleged in the plea. The plaintiff says it was a general acceptance, and the defendant that it was a qualified acceptance. This is a pertinent issue. You must select some one fact. The plaintiff has selected the fact most material in the case. Indeed, I do not see very well what other issue could have been taken. The parties may very well go to trial upon the issue whether there was a qualified or general acceptance upon the bill.

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(a) *Bolton v. Cannon*, 1 Vent. 271; ante, 320.

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plaintiffs averred that they did demise the tenements to the defendant for the time and upon the terms aforesaid; and that the defendant became tenant to them, as executors, for the term, and until the same ended. Breach, in not repairing. The second count also stated a demise, and a promise to repair during the tenancy. The third count stated, that in consideration the defendant, at his request, had become and was tenant to the plaintiffs as executors, upon and subject to the terms that he should as such tenant, during his tenancy, keep the tenements in tenantable repair, the defendant promised to keep the tenements in tenantable repair during his tenancy; and although such tenancy has continued from thence hitherto, the defendant has not repaired. Plea: non assumpsit. At the trial of the cause before *Denman*, C. J., at the London sittings after last Hilary term, the following facts appeared:

The testator, who occupied the premises under a lease, bequeathed them to his widow (whom he also made his residuary legatee) for the remainder of the term, if she should so long live, with remainder to children. After his death, the widow continued to occupy for three months; after which, the plaintiffs having advertised the premises to be let, the defendant agreed to take them, and a draft of an underlease by the plaintiffs, as executors, to the defendant, was sent to him, but never returned. The defendant afterwards wrote the following letter to Mrs. *Richardson*:

“Madam,—I engage to take the premises late in your possession, at Leyton, from the present half quarter, for the term of three years, at the rent of 150*l.* per annum, payable quarterly on the four most usual days, including in the first payment the amount due from the present time to Lady-day next. I further engage to keep the premises in good repair during the whole of the time they shall be in my occupation, and to insure the house, &c. for the sum expressed in the lease from Mr. *Copeland*, as well as to pay all rates, taxes, &c. for which you would have been liable if still occupying the said house.”

The plaintiffs' counsel offering to read this letter, it was objected, by *Bompas*, Serjt., that it could not be read without a lease-stamp, as it was an agreement to take a term or more than three years. The Lord Chief Justice admitted the letter, subject to a motion to this Court, and the case proceeded. The defendant, after making this agreement, occupied the premises until the end of the three years from the ensuing Lady-day, when he left them, much out of repair. It was objected that the letter was no evidence of a contract with the executors, but with Mrs. *Richardson*. His lordship left this as a question for the jury; and they found it to be a contract with the plaintiffs as executors, and gave them a verdict, damages 100*l*.

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Bompas, Serjt., now moved for a nonsuit or a new trial. The letter amounts to an agreement for a lease for three years and half a quarter; but not being stamped with a lease-stamp, it could not be produced in evidence as a written instrument: consequently the agreement was void under the statute of frauds, and therefore the demise laid in the declaration is not proved. [*Parke*, J. In the third count no demise is alleged. May not the defendant be considered as a tenant from year to year, subject to the terms of the paper?]

First point:
Lease-stamp.

The plaintiffs were bound to declare upon the special contract. [*Littledale*, J. They have done so in the third count. It is alleged that he became and was tenant upon certain terms.] It certainly has been held, in *Doe d. Rigge v. Bell* (a), that a lease by parol for more than three years, though void under the statute of frauds, enures as a tenancy from year to year, subject to certain of the terms in the contract; but the tenant is bound by the terms of the contract as far only as the *consideration* extends. If the consideration fails, the terms are not binding. In the case of repairs agreed to be done, the consideration is

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Demise.

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ordinarily the length of time for which the tenancy is to continue. Here, the agreement to repair was made upon the supposition that the term was to continue for more than three years; but the defendant has only had a tenancy from year to year. [Lord *Denman*, C. J. He should have obtained a lease. If he chose to enter into a contract of this kind upon such an imperfect instrument, he must be bound by it. *Patteson*, J. You put it too strongly when you say that the consideration *fails*. The defendant would have power to enforce the granting of a lease. *Littledale*, J. He might enforce it in a court of equity, there having been a part-performance.] A court of equity cannot in this manner in effect set aside the statute of frauds, by enforcing a contract for a lease, which is void under the statute, on the mere ground that the party has entered and expended money (*a*). [*Parke*, J. It is in cases void under the statute that equity *does* interfere. It is considered a fraud upon the party not to give the party a lease when he has entered, and laid out money upon the faith of an agreement.]

Fourth point:
 Proper plain-
 tiff.

There was nothing to shew a taking from the plaintiffs as executors. The letter which the plaintiffs put in as evidence of the contract, shews an agreement to take from Mrs. *Richardson*. The question whether the agreement was with her, was left to the jury, who found that it was with the executors. It was not a question for the jury, but for the Court. In considering whether the agreement was with Mrs. *Richardson* on her own account, or as agent to the executors, it is material to look at the title to the property, the state of which may be material where it is doubtful with whom a contract is made. Now, it appears from the probate, that the widow, and not the executors, was entitled to the premises, and that she occupied for some time after the death of the testator. The only evidence of a contract with the executors is, that the original

(*a*) As to the effect of part-performance in exempting a transaction from the operation of the statute, see Sugd. Vend. & Purch. 9th edit.

negotiation was with them. All the terms of the letter, which was put in by themselves, shew that the defendant considered himself as contracting expressly with Mrs. *Richardson*. [*Parke, J.* If it was entered into by her really for the benefit of the executors, it must be considered that she was their agent. It was a question of fact to be left to the jury.]

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LITLEDALE, J.—The husband of Mrs. *Richardson* Fourth point. died, and by his will left her the house which he had occupied for the remainder of the term, if she should so long live, with remainder over to children. She occupied for a short time, when there appears to have been some arrangement with the executors, in consequence of which she quitted the premises. Negotiations for letting to the defendant are entered into by the executors, and the defendant writes a letter to Mrs. *R.*, in which he promises to keep the premises in repair. The first question which arises is, whether an action for not repairing should be in her name or in that of the executors, who had the legal interest, unless they had assented to the bequest. If Mrs. *R.* had remained in possession for a long time after the death of her husband, that circumstance would have furnished evidence of assent to the bequest to her on the part of the executors. But in fact she remained only a short time. The fact of assent was a question for the jury; and it was left to them to say whether the contract was with her or with the executors. That was properly left, because I think it embodies the question whether the executors had assented. If the widow had occupied four or five years, there might be a great doubt whether the executors could maintain the action.

Then, supposing that the jury have properly found that the contract was entered into by Mrs. *Richardson* as agent Second point. to the executors, the next question is, whether the defendant was bound to repair. The agreement being for more than three years, and not being in writing, it conferred no

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legal estate for that term; and it is argued that if the tenant had had a legal term, it would have been a fair agreement that he should undertake the repairs mentioned in the letter, but that if he had only a tenancy from year to year, he could only be liable to ordinary repairs. It appears to me, that though he has no legal term, yet if a party chooses to enter into a contract not valid, and to take possession upon it,—if he himself relies on mere possession, knowing that if he likes he may have a valid lease, and he contracts to repair, he is bound by his contract.

PARKE, J.—I am of the same opinion.

Second point.

I quite agree that the first and second counts are not supported, for that there is no such contract as is alleged in them.

First point.

The contract upon which the plaintiffs relied, supposing it to have been duly signed, could not be given in evidence without a stamp.

Third point.

But the third count, which states that the defendant was tenant, without saying that he was tenant under a lease, and in consideration thereof agreed to repair, appears to me to be supported. From the moment when he took possession during the first year, he was tenant at will, subject to his own express agreement to keep the premises in good repair during the whole of the time that they should be in his possession. He has entered into a positive engagement, at all events, to repair during the time that he actually occupies.

Fourth point.

Upon this contract, Mrs. R. was *prima facie* entitled to sue, but it was perfectly competent to third persons to shew that the contract was really entered into for their benefit, in which case the contract may be treated as entered into with them (a). It was a question of fact whether the contract was entered into by Mrs. R. as agent for the plaintiffs or not, and it was fairly so left.

(a) See *Berkeley v. Hardy*, 5 Barn. & Cressw. 355; 8 Dowl. & Ryl. 102.

PATTESON, J.—I am also of opinion that the third count being proved, the plaintiffs are entitled to recover under it. It is true that the engagement to repair is generally entered into in consideration of the length of the term, but it is too strong to say that the consideration for the agreement fails in this case. The defendant may have intended to be tenant from year to year upon an agreement to repair; and it is to be observed that he has actually occupied for the whole time contemplated.

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Lord DENMAN, C. J.—I am of the same opinion. The verdict must be entered for the plaintiff upon the third count, and for the defendant upon the other counts.

Rule accordingly.

DOE d. DRAPER v. LAWLEY.

EJECTMENT for a cottage and garden in Shropshire. At the trial before *Patteson, J.*, at the last Shrewsbury spring assizes, the following facts appeared:—

The premises in question were enjoyed by *Abigail Monk* as her own property, until the 5th April, 1795, when she died, leaving several children, of whom the eldest was *Edward Monk*, whose eldest son, *William*, is now living. *Patience*, the youngest daughter of *Abigail*, (having married, in 1780, *William Draper*,) after the death of her mother in 1795, entered and continued in possession until the 1st September, 1805, when she died, leaving *William Draper* (the lessor of the plaintiff), her eldest son and heir at law. *William Draper*, the father, continued in possession and married *Mary Lawley*, who resided on the premises with her husband until his death, in the latter part of 1815, and afterwards until her own death. Her son (the defendant) then entered,

In ejectment it is no answer to a *prima facie* title from 20 years possession, that such possession was in continuation of that of a sister who entered by abatement into the land to which her elder brother (whose issue is alive) was entitled as heir, and who died more than 20 years before the ejectment was brought.

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whereupon this ejectment was commenced. The defendant set up the title of *William Monk*, and contended that the possession of *Patience* from 1795 to 1805 could not be considered as adverse to her elder brother (*a*), and that the possession of her husband from 1805 to 1815 was in the nature of a tenancy by curtesy, and being derived from her, would be subject to the same defects as her possession. The learned judge, however, considered the possession as adverse, and directed the jury to find for the plaintiff, which they accordingly did.

Ludlow, Serjt., now moved for a new trial. The possession of *Patience* was, in contemplation of law, the possession of her brother. The right of the elder brother or of his issue, to enter upon the issue of *Patience*, still continues. In Com. Dig. *Abatement* (A.), abatement is described, and then it is said, "If the younger son enter before the eldest, it will be an *abatement*; though if he afterwards die seised, and the land descend to his issue, the descent does not take away the entry of the eldest son, because it shall be intended* that the younger son entered claiming *as heir*." Chief Baron *Comyns* refers to *Littleton*, sections 396 and 397. In the former it is said, "If a man seised of certain land in fee, have issue two sons, and die seised, and the younger son enters by abatement into the land, and hath issue, and dieth seised thereof, and the tenements descend to his issue, and the issue enter into the land, in this case the eldest son, or his heir, may enter by the law upon the issue of the younger son, notwithstanding the descent; because when the younger son abated into the land after the death of his father, before any entry made

(a) But now by 3 & 4 *Will.* 4, c. 27, it is enacted (sect. 13,) "that where a younger brother or other relative of the person entitled as heir to the possession, or receipt of the profits, of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

by the eldest son, the law intends that he entered claiming as heir to his father. And because the eldest son claims by the same title, that is to say, as heir to his father, he and his heirs may enter upon the issue of the younger son notwithstanding the descent, &c., because they claim by the same title." To this passage there is the following note by Mr. *Hargrave*: "When a younger brother enters in this case, he does not enter to get a possession distinct from that of the elder brother, but to preserve the possession in the family, that nobody else abates; *Gilb. Ten.* 28." And Lord *Coke*, in commenting upon the 396th section of *Littleton*, observes, that "assisa mortis antecessoris non tenet inter conjunctas personas sicut fratres et sorores, &c., for they are privies in blood, but it lieth against strangers." This is because the right of entry is not taken away. Such an entry by a sister or younger brother as would amount to a disseisin, if made by a stranger, does not affect the entry of the elder brother. The onus with respect to the character of the possession lay upon the plaintiff; and though it was open to him to shew any thing against the presumption, by evidence that the possession was adverse, unless that were shewn, the presumption favours the title of the elder brother. The adverse possession in this case could only date from the death of *William Draper* in 1815, and the ejectment was brought in 1833. *Draper* occupied 20 years, but partly during coverture, and partly in continuation of his wife's actual possession. [*Parke, J.* There has been 20 years adverse possession. The husband occupied for some years after the death of *Patience*, and died in 1815, and since that time others have taken from him.]

Lord DENMAN, C. J.—I see no ground for disturbing the verdict on the ground of the mere relation of brother and sister. The onus of explaining the character of the possession lies upon the party against whom the presumption from possession arises.

LITLEDAL, J.—I entirely concur.

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PARKE, J.—There is a very good *prima facie* title from 20 years possession, and nothing to answer it.

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PATTESON, J.—There was no evidence of any interference on the part of the brother. The mere relationship I cannot think a sufficient answer to the plaintiff's *prima facie* title.

Rule refused.

The KING v. NOCKOLDS and others.

By an act for inclosing lands in a parish, and extinguishing its tithes, the commissioner is directed to value the tithes, as being equal to a fixed proportion of the *net*

UPON an appeal to the Easter quarter sessions for the county of Huntingdon, in which the Rev. *George Mingaye*, rector of Wistow, was appellant, and Mr. *Nockolds*, (the commissioner under 11 *Geo.* 4, c. 5, for inclosing lands and extinguishing tithes in the parish of Wistow,) and the churchwardens and overseers of Wistow, were respondents; the sessions by their order determined, (subject to the opinion of this Court upon the following case,) first,

annual value of the lands, and then to find an equivalent corn-rent; and by his award, or some previous writing under his hand, to be annexed thereto, to set forth the same, and to apportion the corn-rent upon the lands of the respective proprietors, and to fix when the first payment of the corn-rent shall be made, and when the tithes shall be extinguished; and a right is given to any person aggrieved, by any thing done in pursuance of that act, to appeal to any general or quarter sessions in the county, held within four months next after the cause of complaint shall have arisen.

The commissioner having determined the amount of the corn-rent, and fixed the day for the first quarterly payment of it, and also the day from which the tithes shall cease and be extinguished, by a previous writing, which afterwards is annexed to the award. — Held, that an appeal by the rector on the ground of the corn-rent being inadequate, must be within four months of such previous writing, and that an appeal within four months of the date of the award is not in time.

Seem, that no notice of the corn-rents having been fixed, and the tithes extinguished by the previous writing, was requisite, though the act required that all notices necessary to be given by the commissioner should be given in a particular way, eight days before the period for doing the business to which such notice shall relate.

But held, that supposing that the four months could not be allowed to run until the party intended had notice that his rights had been affected, notice given by the commissioner in the manner required by the act in other cases is sufficient, although the notice which states in general terms what had been done, refers for particulars to a schedule deposited at a distant place; and held also that private notice is sufficient.

Corn-rents substituted for tithes are in general liable to parochial burthens.

Whether they would be so liable where the commissioner, being directed by the act to deem the tithes equal to a fixed proportion of the *net annual value* of the lands, in making the calculation, makes a deduction from the gross value of the land for the parochial burthens, *quære*.

that the appeal was made within the time limited by the act: and secondly, that the appeal was good upon the merits.

By 11 Geo. 4, c. 5, (private act) s. 25, it was enacted, that the commissioner should ascertain the yearly value of all tithes within the parish of W., and in so doing should consider certain proportions of the *annual net value* of the lands of the parish as the value of such tithes, and then should ascertain the average price of wheat within the county during the preceding seven years, and should by his *award*, or by some *previous writing* under his hand, *to be annexed thereto*, ascertain and set forth what quantity of corn would equal the annual value of the tithes, and determine what sum of money would be equivalent to such quantity of wheat; such sum to be charged and apportioned by the commissioner upon the lands and tenements of each proprietor, to be issuing out of the lands &c. charged therewith, and to be paid by the occupier to the rector, by four quarterly payments; the first payment to be made on the 25th March next after the execution of the *award*, or *such* earlier quarterly days of payment as the commissioner should by *such award or by such previous writing as aforesaid* direct. This rent was declared to be in satisfaction of all tithes &c. which from the time of the apportionment of the rent, or at such other time as the commissioner *by any writing* under his hand should fix and appoint, should cease, determine, and be for ever extinguished.

By section 60 it is enacted, that if any person shall think himself aggrieved by any thing done in pursuance of that act, (except in certain cases,) such person may appeal to any general or quarter sessions of the peace for the county of Huntingdon, held *within four calendar months next after the cause of complaint shall have arisen*, giving to the commissioner and the parties concerned notice in writing of such appeal, ten days before such sessions.

3 October, 1832. The commissioner, by an instrument in writing under his hand, declared that having ascertained

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the quantity of wheat equal to the net annual value of tithes and the equivalent sum of money, he determined that 388*l.* 7*s.* 11*d.* was equivalent to the quantity of wheat ascertained to be equal to the value of the tithes, and he charged and apportioned such sum on all the lands in the parish in the sums and proportions, and in the manner set forth in the schedule annexed thereto, and declared that they should be issuing out of the lands &c. thereby charged therewith, by quarterly payments, the first to be made on the 25th December then next, and should be in lieu and full satisfaction of all tithes within the parish, and that all tithes within the parish had ceased and determined as from the 29th September then last, and were for ever thenceforth extinguished.

Notice to ap-
 pellant.

A copy of the schedule referred to was sent to the appellant, with notice of the tithes having been extinguished, and the corn rents in lieu thereof having been charged and fixed, which it appeared had been received by the appellant early in October, 1832, but such copy of the schedule did not refer to the said writing respecting the extinguishment of the tithes, nor did it mention a notice of the extinguishment of such tithes, but it was merely a copy of the schedule of the several allotments and old inclosures, &c. in the parish of Wistow, the yearly corn-rents, or sums charged thereon, together with the quantity of wheat equal to the annual value of the tithes thereof respectively.

A notice, signed by the commissioner, stating that the tithes had been extinguished, and the corn-rents fixed and charged in lieu thereof, in the manner expressed in the schedule then deposited with the clerk, at his office in Great James Street, Bedford Row, London, was fixed to the principal door of the church of Wistow, about the 13th, and advertised in the Huntingdon Gazette on the 6th October, 1832; the 9th section of the Wistow Inclosure Act having directed that all *notices necessary to be given* by the commissioner shall be given by advertisement in the Huntingdon Gazette, or in some other Huntingdonshire or Cambridge newspaper, and affixed to some prin-

cipal door of the church of Wistow, eight days before the period for doing the business to which such notice shall relate.

The several allotments under the inclosure act had been previously set out, and possession thereof taken by the persons entitled.

17 January, 1833. The commissioner's general award was signed. It did not alter the previous writing or corn-rent schedule, but merely referred to it by a recital that such a deed was made on the preceding 3d October, and was annexed to the award.

22d March, 1833. The rector gave notice to *Nockolds* (the commissioner) and to the churchwardens and overseers, of his intention to appeal to the next quarter sessions, against the award and declaration of the commissioner, and entered an appeal accordingly.

9 April, 1833. The appeal coming on to be heard before the sessions, it was objected on the part of the respondents, that the Court had not jurisdiction to hear the appeal, for that *the cause of complaint* had arisen more than four calendar months previously, viz. on the 3d October, 1832. The sessions, however, overruled this objection, (subject &c.) and went into the merits of the appeal.

Upon the merits the question was, whether 388*l.* 7*s.* 11*d.* was a just equivalent for the tithes. In estimating the annual net value of the lands, for the purpose of ascertaining the corn-rent, the commissioner made deductions from the gross value of the land, for, amongst other things, the poor-rates, and then assessed the corn-rent upon such reduced value.

In a letter written by the commissioner to the appellant, on 14th February, 1831, in reply to one written by the appellant upon the subject of the corn-rents, he says, "I am bound by the clause to a certain mode of ascertaining the tithes, and to set out the *net* annual value of the corn-rents; which implies that they are to be free of all parochial rates and other annual outgoings."

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In a letter dated 13th December, 1832, from the commissioner to the appellant's solicitor, in reply to one in which the commissioner was asked to insert a declaration in his award, to the effect that he had deducted the poor-rates *from the value of the lands*, in making his valuation for the corn-rents, the commissioner says, "I cannot possibly have any objection to the insertion of such words in the award, as will make it clear to all parties concerned that the corn-rents are calculated as payable and to be paid to the rector and his successors, free from all parochial rates and deductions whatever, except the land tax chargeable in the said rectory, such being the principle upon which the schedule is drawn, according to the construction of the act of parliament."

The commissioner, however, when he made the award, declined to state in it that he had deducted the poor-rates in making the valuation of the corn-rent, although he asserted that such was the fact.

There is no statement in the award that the corn-rent *was calculated* as payable, or that the same *is* payable, free from all parochial rates, &c. The sessions were of opinion that the award was properly appealed against, on the ground that the sum awarded was not an equivalent for the tithes, according to the provisions of the act.

F. Kelly and *Gunning*, in support of the decision of the sessions. Two questions are raised.

I. Whether
 appeal in due
 time.

The first question is, whether the appeal was entered in time. The appeal was within four months of the publication of the commissioner's award, and within four months of the time when the first payment of the corn-rent was ordered to be made, but not within four months after the declaration was signed and the schedule made out. The statute certainly gives the commissioner power to do certain things before the award is made, but these writings are to be annexed to the award, so that no act can be considered as completely and legally perfected until it be so annexed.

Till then it was only contingent. It was not published until the award was made. It is true that a copy of the schedule was sent to the appellant, but this is not required by the act. If the act had required that notice of the extinguishment of the tithes and of the schedule should be given to the appellant, there would have been some ground for arguing that the appellant ought to have dated his grievance from the time of the notice in October. [*Patterson, J.* Is there any special clause requiring that such a notice should be given? All I find is a clause directing the mode of giving the notices *necessary* to be given by the commissioner.] There is none; the only reasonable mode of giving notice is by annexation to the award, and it would be a hardship upon the party if the four months were to commence before legal notice.

The second principal question is upon the merits. The valuation of the commissioner proceeded upon a mistaken notion that the corn-rent would be discharged from the poor-rate. If that were in fact the law, the rector would not have appealed, for the difference in the amount to which he would have been entitled, would be substantially nothing. [*Littledale, J.* In *Rex v. Boldero (a)*, we decided that a corn-rent is liable to the poor-rates.] Nothing but an express provision in the act can exempt the corn-rent in the hands of the rector from liability to poor-rates. In *Rex v. Boldero* the words were not *net annual value*, but *annual value* only; but in *Rex v. Lucy (b)*, where the word “*net*” was used, the Court held that the rents calculated according to the net annual value of the tithes, were liable to the parochial burthens. The parochial burthens are constantly fluctuating, so that the commissioner could have no means of estimating its amount. There is abundant reason for believing that the legislature, in using the word “*net*,” never contemplated that the commissioner should take into consideration the poor-rates.

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II. Whether
valuation
made upon
the correct
principle.

(a) 6 D. & R. 557; 4 B. & C. 467.

(b) 8 D. & R. 457; 5 B. & C. 702.

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First point:
Whether ap-
peal within
time.Sir J. Scarlett, Pryme, Cooper and Tomlinson, *contrà*.

I. The appeal was not entered within four months after the cause of complaint arose. The commissioner was empowered to do this act as well by a previous writing under his hand as by the award itself. The separate writing is an award quoad hoc, and as to this part of his duty the commissioner was *functus officio*, and could not afterwards by his award alter his former determination. The act, it is true, requires the papers to be afterwards annexed to the award, but that can only be for the purpose of preservation. The rector might certainly have appealed against the previous writing, if he thought himself aggrieved by it. He had full notice of the extinguishment of the tithes, supposing such notice to be necessary, for which there appears to be no reason. The notice on the church door was notice to him, and the act of the commissioner in sending him a copy of the schedule, (an act not required by the statute,) was also sufficient notice. In *Rex v. Gloucestershire* (a) it was held, that an insufficient allotment made to the vicar of Tewkesbury, under an inclosure act, in lieu of tithes, was not a grievance until the tithes were also extinguished, but that as soon as the allotment was coupled with a determination of the vicar's right to tithes, it became a grievance and a cause of complaint. Here, the writing or declaration of October, 1832, at once deprived the rector of his tithes, and substituted a corn-rent. If that rent was insufficient, so as to give him a cause of complaint, it arose at that time.

Second point:
Mode of esti-
mating *net*
annual value.

II. What is the net annual value? That which comes to the proprietor or occupier after all deductions to which the land is liable. The words are plain and intelligible; and with respect to the difficulty which has been alluded to, of calculating the amount of the poor-rates, it is to be observed, that such a calculation is made with sufficient accuracy in every case of a purchase of land. The commissioner has considered the land as being worth what a

(a) 3 Maule & Selw. 127.

tenant would give for it, he paying the parochial burthens. In *Rex v. Boldero* (a) there was no question as to the meaning of *net* annual value, but the principle there acted upon is the same as that adopted here. In *Rex v. Lacy* (b), though the word “net” does occur, yet it is used with reference to a very different subject. There the question was, what is to be considered as the net annual value of the *tithes*; and the difference of the subject-matter rendered it necessary to adopt a different principle. The principle adopted by the commissioner in the present case, was acted upon in *Rex v. Boldero*, and is not affected by the decision in *Rex v. Lacy*, in which *Rex v. Boldero* is recognized; it is also acted upon in *Rex v. Tomlinson* (c), *Rex v. Lower Mitton* (d), *Rex v. Duke of Bridgewater* (e), and in *Rex v. Hull Dock Company*.

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LITTLEDALE, J.(f)—One question which arises is, whether the corn-rent is calculated upon a proper principle, but as I think that the notice was not given in time under the act, we need not express our opinion upon that point. The act, which is for inclosing lands in the parish of Wistow, and extinguishing its tithes, after directing in what way compensation is to be made to the rector in lieu of tithes, directs (section 60) that if any person shall feel himself aggrieved by any thing done in pursuance of that act, he may appeal to any quarter sessions which shall be held within four calendar months after the cause of complaint shall have arisen. The question therefore is, *when* the cause of complaint arose. The 25th section, after having directed that the tithes shall be valued and the average price of wheat ascertained, requires the commissioner, by his award, or by some

(a) 6 Dowl. & Ryl. 557; 4 Barn. & Cressw. 467.

(b) 8 Dowl. & Ryl. 457; 5 Barn. & Cressw. 702.

(c) 4 Mann. & Ryl. 169; 9 Barn. & Cressw. 163.

(d) 4 Mann. & Ryl. 711; 9 Barn. & Cressw. 810.

(e) 4 Mann. & Ryl. 143; 9 Barn. & Cressw. 68.

(f) Lord Denman, C. J., was at the Privy Council.

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previous writing, to ascertain and set forth what quantity of wheat will be equal to the value of the tithes, and what sum equal to the value of the wheat, which sum is to be charged on the lands and tenements within the parish. It appears that this might be done previous to the making of the award. It very frequently happens that awards are delayed till all interlocutory matters are disposed of; and very properly so, because otherwise the greatest inconvenience would arise. The award might, upon any part of it having been appealed against, require to be altered, and it might be a question whether the commissioner could alter the general award after it is once made. At all events it would be a great inconvenience if the award were to be so altered. Commissioners, I think, ought to wait till all matters are finally settled; I therefore think that this is a cause of complaint that, in the contemplation of the legislature, might arise before the award has been made. The separate writing is to be annexed to the award, that is, annexed to the award when it is made, and to be governed by the same rules as the award as to being admitted in evidence. I consider these previous writings as a kind of intermediate things in the nature of an award, and to continue such until finally annexed to the award, and that the commissioner has power to do the same thing by this preliminary course as by the final award itself. The commissioner may see whether or not the several awards are appealed against before he makes his final award. The case finds that the commissioner, by a writing under his hand, has ascertained and set forth the quantity of wheat equal to the value of the tithes, and has ascertained the sum which is equal to the quantity of wheat, and has awarded it on different lands, and has directed that the tithe should cease. This was done *in pursuance of the act*, and there was then at least a kind of *prima facie* cause of complaint. It is said that parties ought not to be bound till they have notice. I think it doubtful whether any notice was requisite here, for the appellant must have known that the commissioner was act-

ing and proceeding under the act to which *the appellant himself was a party*. But supposing that notice was necessary, he has had sufficient notice to require his appealing before he did. A copy of the schedule was sent to the appellant, with notice of the tithes having been extinguished, early in October, 1832. Now it is very true that the schedule did not contain the principle upon which the corn-rent was calculated, but the rector had from the schedule notice of the amount of the corn-rents. He had notice also of the tithes having been extinguished. Besides that, notice is sent by commissioner, preparatory to the tithes being extinguished, to the Huntingdon Gazette, and afterwards by affixing it to the church door, which, as the case says, is the mode of giving notice required by the 9th section of the act. Now I very much doubt whether that enactment applies to a notice of this kind. I think it applies only to business done at the commissioner's sittings. Though the manner in which notice is to be given in such a case as this is, as it seems to me, not specified by the act, I think there was a sufficient notice to the parties interested. Here was a notice stating what had been done, and what rights altered, given in the mode which is for several purposes recognized by the act as sufficient. One objection to the notice itself is, that it refers to the clerk who resides in Great James Street, Bedford Row. I do not think the rector was bound to go there, and I think that if the notice had been this only, that the parties interested might be informed of what had been done upon applying at the office of the clerk, it might have been bad; but I think that the notice on the church door was sufficient, particularly when taken in connection with the notice in the newspaper. If the parties required more particular information, they might go to London for the purpose. I will notice one other thing, that is, the correspondence set out in the case, which shews that at all events before the letter of 13th December, the appellant had full notice of what had been done. I think it quite clear that the appeal was not made at any

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sessions held within four months of the time when the appellant received notice, and therefore that it was too late.

PATTESON, J.—I think also that the appeal was too late. By the 60th section, “if any person shall feel himself aggrieved by *any thing done in pursuance of this act*,” he may appeal to any general or quarter sessions held within four months next after the *cause of complaint* shall have arisen. These words evidently contemplate things done previously to, or at all events independently of, the award. What is the thing done here which constitutes the cause of complaint? The giving to the rector a smaller sum for his tithes than he thinks himself entitled to. When is that done? The commissioner is to direct *when* the corn-rents are to become payable, and *when* the tithes are to be extinguished by his award, or by some previous writing under his hand, to be annexed to the award, in order that parties may have access to them together. The act does not say that the previous writing is not to be operative until annexed to the award; on the contrary, the corn-rents are to become payable, and the tithes to be extinguished at the time fixed upon, either by the previous writing or by the award. The commissioner did fix the time by his previous writing. The *thing done*, by which the appellant is aggrieved, is the writing and signing that instrument; and the cause of complaint arose on the 3d of October, when it was so signed.

There is no clause requiring notice to be given of the writing by which the tithes are extinguished. It is said to be a hardship to allow the time of limitation to run before the party has notice; but this is met by shewing that the commissioner did give notice on the church door, and in the Gazette, which notice contained a reference to the instrument, signed and sealed by him. And, what is more than that, the rector, in the early part of October, received a copy of the schedule, with notice of the tithes having been extinguished and the corn-rent having been fixed in

lieu of it. That was much more than four months before the appeal was entered. The ninth section directs in what manner notice shall be given *when it is required* by the act. I do not think that it is required here, but the commissioner has acted quite properly in giving notice in the manner required in other cases. I cannot help observing from the correspondence, that the rector must have been well aware of the mode in which the valuation was made, and that he did not object to it, but he wished to have it shewn, so that it would exempt his corn-rent from the poor-rates. Unfortunately the commissioner did not do so. The rector has been misled probably by the commissioner's letter. I do not know whether the valuation having been made in the manner shewn, may not exempt the rector from the payment of rates. I do not know whether it does or does not. When the rector, however, finds that the commissioner has omitted to state upon his award the mode of valuing, he appeals against the award, but it is clear that this omission was no ground of appeal, for the commissioner was not bound to state it. Therefore his only appeal was against the declaration of 3d October, and in that he was too late.

WILLIAMS, J.—I am of the same opinion. I had doubts at first whether any act done by the commissioner could be considered as final before the award was made, but now it seems to me perfectly clear that the previous writing is to be equally as effective as the award itself, and that the commissioner might extinguish the tithes and give the corn-rent by the previous writing. The act of 3d October was competent to extinguish the tithes, and was clearly the cause of complaint. The rector had special notice; the notice in the Gazette must be taken to have reached him, and he can hardly be supposed not to have watched, step by step, a proceeding in which he was so much concerned.

Order of Sessions quashed.

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SAFFERY and others, Assignees, &c. of THOMAS DEAN
ALDERSON, a Bankrupt, v. ELGOOD and another.

The goods of C. found upon land, out of which a rent-charge has been granted by A. to B., are liable to the distress of B., unless C. has an interest in the land paramount to that which A. had at the time of the grant.

A grant of an annuity for lives, charged upon land, in which the grantor has only a *chattel interest*, will enure as a grant during the term if any of *cetteux que vies* shall so long live.

REPLEVIN for the taking and detention of the goods of the plaintiffs, as assignees, in a certain warehouse, in the parish of St. George, Hanover Square. The defendants made cognizance, as bailiffs, of *Josias Henry Stracey*, stating, that on 17th June, 1805, Lord *Rodney* and *Hugh Powell*, Esq. being seised in fee, demised to *Hunter* and *Bramah* certain land, on part whereof the warehouse is situate, habendum to *Hunter* and *Bramah*, their executors, &c. for sixty-six years. On the following day *Hunter* released his interest in the term to *Bramah*. On the 28th February, 1809, *Bramah* demised the land, with all buildings thereon, to *George Alderson*, for sixty-two years and a half, wanting twenty-one days. By indenture of 6th June, 1809, *George Alderson* granted to *Stracey*, his executors, administrators and assigns, for four lives, a yearly rent-charge of 300*l.* charged upon and issuing out of the land, payable 6th September, 6th December, 6th March, and 6th June. And *George Alderson*, for himself, his heirs, executors, &c. covenanted with *Stracey*, his executors, administrators and assigns, that in case the rent-charge, or any part thereof, should be unpaid fourteen days, it should be lawful for *Stracey*, his executors &c., to enter and distrain, and the distress or distresses then and there found to take away and impound, until the rent-charge, and all arrears and costs should be paid, and in default of payment in due time, to appraise or sell the same, or otherwise to act therein according to due course of law, in the same manner, in all respects, as landlords are by act of parliament authorized to do in respect of distresses for arrears of rent reserved on leases for years (a). Averment: that three of the *cetteux que vies* were living. And because 75*l.* of the rent-

(a) As to the effect of this proviso, see *Miller v. Green*, 8 Bingh. 92; 1 Moore & Scott, 199.

charge, for a quarter of a year, ending 6th March, 1832, was due and in arrear to *Stracey*, and remained due for the space of fourteen days, and until the time when &c., the defendants, as bailiffs of *Stracey*, acknowledged the taking of the said goods in the places in which &c., the same places in which &c. being then and there built upon the demised land, and justly &c. for and in the name of a distress for the said arrears. Second cognizance by the defendants, as bailiffs of *C. A. H. Heaton*. This cognizance was the same as the former, adding a deduction of title to the rent-charge, through several mesne assignments to *Heaton*.

General demurrer to both cognizances. Joinder in demurrer.

Platt, in support of the demurrer. It is only necessary to consider the first cognizance, for the assignee could not be in a better situation than the grantee. The first cognizance is insufficient in law on two grounds.

I. The grant of the annuity was void. *George Alderson* was only a termor, and he assumed to grant an annuity for lives, without reference to the term. A rent-charge for a freehold interest cannot issue out of a term of years (a). The grant extended beyond the legal estate of the grantor. Although as between the grantee and the grantor, the latter might be bound by the deed by way of estoppel, still the distress cannot be justified as against the plaintiffs, who are not shewn by the cognizance to claim under the grantor, or to be privy in estate with him, and who therefore are not bound by such estoppel. [*Patteson*, J. It is not put as a case of estoppel in *Butt's* case (b). It is said that the charge shall be good for the term, if the grantee so long live. He has a chattel interest for life.]

(a) Where a term was bequeathed to *A.* for life, remainder to *B.*, it was held to be a good bequest to *B.*, of so much of the term as was unexpired at the death

of *A.*; *Matthew Manning's* case, 8 Co. Rep. 95. And see *Cotton v. Heath*, 1 Roll. Abr. 612, pl. 3, (8 Vin. Abr. 93.)

(b) 7 Co. Rep. 23.

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II. Supposing the grant not void, how can it operate to give a right to seize the goods of a stranger? What right could *George Alderson* have to say that the goods of a stranger upon the premises should be distrainable for the arrears of his rent-charge? The plaintiffs are to be considered as strangers, for it is not shewn that they claim under *George Alderson*. If the lord of a manor grant a rent-charge upon the manor, the goods of the copyholders are not liable to be seized. If a lessor charge his lands, the goods of an antecedent lessee are not distrainable. Where one joint tenant charges the lands of which he is joint tenant, the goods and chattels of his co-tenant are free. The authorities on this subject are collected in *Com. Dig. Distress*, (B. 2,) and all shew that in no case can the goods of a stranger be seized for a rent-charge. [*Patteson*, J. There are cases in *Rolle's Abridgment* which seem to say so, but upon looking at them I find they do not support the proposition in *Com. Dig.*, and the case in 2 *Saunders*, 290, is against it.] How then does it happen, in the case of the copyholder, that his goods are free? [*Patteson*, J. It is laid down that the interest of the copyholder is paramount to that of the lord. If you had pleaded in bar, that before the rent-charge was granted, a lease had been granted by you, the case would have been different, for then your interest would have been paramount to the rent-charge.]

Addison, contra, was stopped by the Court.

LORD DENMAN, C. J.—The first point has been abandoned. The second point is, that the goods of a stranger cannot be taken for the arrears of a rent-charge. The authority for that position seems to rest entirely upon what is said in *Com. Dig. Distress*, (B. 2,) and I think there never was an authority less satisfactory. It is there said, that for a rent-charge generally, the cattle or goods of a stranger

cannot be distrained, *dubitatur*, 15 H. 7, 17, b. (a); *contrà*, 1 Roll. 669, l. 25 (b); *quare*, 1 Roll. 668, l. 13 (c); R. acc. 1 Roll. 672, l. 12 (d).” It would be very difficult to collect from this what the law is. The next position in *Com. Dig.* is, that “if one joint-tenant grants a rent-charge, the cattle of his companion cannot be distrained” (e). That is perfectly correct and perfectly clear. So, of the next, that “if a man makes a lease and afterwards grants a rent-charge out of the land, the cattle of the lessee are not distrainable, *for he claims paramount to the charge*.” “If a rent-charge be granted out of a manor, the cattle of copyholders are not distrainable,” because the copyholders have an interest paramount to the grant. “Or if a rent-charge be claimed out of a manor *by prescription*, *dubitatur*” upon the same principle. Chief Baron Comyns then lays it down as his own opinion, that “where a stranger claims under the grantor after the grant of a rent-charge, his cattle are liable to distress, as the cattle of a lessee, where the demise was after the grant.” Mr. Platt requires us to decide the converse of this; but it does not follow that the goods of a stranger, *not* claiming under the grantor after the grant, should *not* be liable, when he has rashly put them in a place where goods are subject to a distress. I think that there is no authority for denying that the cattle of a stranger are subject to distress for a rent-charge.

(a) H. 15 H. 7, fo. 17, pl. 13, in which this point was not decided.

(b) Citing 11 H. 6, Bro. *Distress*, 69, where, after stating that if one of twelve joint-tenants grant a rent-charge, the grantee may distress the cattle of the grantor, but not those of the other joint-tenants, it is said, “*quare*, of the cattle of a stranger which come damage feasant: Videtur, that they may be distrained.” Brooke cites 11 H. 6, 28, (9 Vin. Abr. 146, pl. 27.)

(c) Rolle says, “But the cattle

of a stranger coming into the land by escape, cannot be distrained for a rent-charge.” For which he cites Fitz. Abr. 18 E. 2, Avowrie, 219; (9 Vin. 144, pl. 4.)

(d) Vouching the case of *Reynold v. Cakeley*, in which it had been held, that the grantee of a rent-charge cannot distress the cattle of a stranger which come there by escape, and are freshly pursued by the owner. (9 Vin. 156, pl. 7.)

(e) *Vide infra*, note (b).

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LITTLEDALE, J.—The first proposition is quite clear. Upon the second question, I think that the cattle of a stranger are distreinable for a rent-charge, unless they are shewn to have been placed there by some one who has an interest paramount to the charge. Here, the facts are, that the assignee of a term grants a rent-charge upon the land demised, which being in arrear, the grantee takes the goods of the plaintiffs upon the land charged. And it is contended, that because the plaintiffs are strangers, their goods were not distreinable. But I think it would require a very strong authority to establish that. A rent-charge is a rent with power of distress; and unless the grantee could distrein the cattle of a stranger being upon the land, I know not what would be the use of the power of distress; for the land might get into the hands of a stranger. In order to exempt the cattle of a stranger, he ought to shew some interest in the land paramount to that of the grantee of the rent-charge. No such title is shewn in the plaintiffs. There are some cases certainly in *Com. Dig.* which seem to favour the proposition contended for; but they are not satisfactory, if examined. In *Viner's Abr. tit. Distress, l.*, it is said, that "the cattle of a stranger that come into the land by escape, cannot be distreined for a rent-charge." And certainly they ought not to be distreinable. Afterwards it is said, "but the grantee may distrein the cattle of a stranger that come upon the land." For this, 11 H. 6 is quoted, and *Brooke, Distress, 69, quære*. Although there is this *quære* from *Brooke's Abr.*, it is stated in the margin to have been the opinion of *Brooke*, that they may be distreined. In 2 *Saunders, 290*, there is a note which, referring to the case of a stranger's cattle escaping into another's land by breaking the fences, says, "The lord or grantee of a rent-charge, who have nothing to do with the fences, may in such case distrein the cattle, after they have been levant and couchant, though no notice is given to the owner;" 2 *Lutw. 1580, Kemp v. Cruwes*, is there cited. That case may be considered as having settled the law; and upon the

authority of that case, the decision in which is founded upon reason, we must hold that the goods of the plaintiffs in this case were liable to distress. If we were to hold otherwise, the grantee of a rent-charge would soon have no power of distressing at all.

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PATTESON, J.—Upon the first point, *Butt's* case is a decisive authority. And with respect to the second point, it is clear, after the case of *Kemp v. Cruves*, that the grantee of a rent-charge may distress the goods of a stranger being upon the land charged.

Judgment for the defendant.

BOOTH and others v. JACOBS and another.

ASSUMPSIT. The first count of the declaration was upon a bill of exchange, drawn 1st September, 1832, by the defendants, on one *Fenton*, for 49*l.* 18*s.* 6*d.*, at three months after date, and indorsed by the defendants to the plaintiffs, and unpaid. The second count was on a bill at three months, drawn 1st September, 1832, on one *Philips*, for 48*l.* 16*s.* 6*d.*, and indorsed to the plaintiffs, and unpaid. Plea: non assumpsit. At the trial before *Denman, C. J.*, at the sittings after last Hilary term, it appeared that the bills had become due on the 4th December, 1832, and were dishonoured. No direct evidence of notice to the drawer was given, but the following letter, written by the defendants to the plaintiffs, who reside at Deptford, near Sunderland, Durham, was given in evidence.

A letter written by the drawer to the holder of a bill, six days after the day on which the drawer should have received notice of dishonour, and containing ambiguous expressions respecting the non-payment of the bill, was held to be properly left to the jury as evidence, from which they might or might not infer that notice had been given on the proper day.

"London, 10th December, 1832.

"Gentlemen,—Your letter this day came to hand. We were rather surprised at the latter part of your letter, wherein you state you would take proceedings against us.

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We fully expected that *Phillips's* bill would have been paid. It will be impossible for me to go out of town to settle our accounts till after Christmas, when we will remit you some cash. Trade is at a stand-still in London at present. We have been doing very little business for these last three weeks, as we are determined not to give any more credit, having had such severe losses lately. We have taken up 100*l.* of return bills of *Mr. Fenton's*, besides other bills on other shops, which were returned, which make us short of cash at this present time. I have called this day on *Mr. Phillips* about his bill. He was not at home. I shall call again to-morrow. You may make yourselves very easy about what we owe you. I will write to you again in a day or two. Law expenses do neither party any good.

"We remain, &c. *Henry Jacobs & Son.*"

There was no question, except as to the notice of dishonour. The Lord Chief Justice left it to the jury to say, whether they could infer from the defendants' letter, that *notice had been sent* by the plaintiffs on the fifth of the month, and directed them to find for the plaintiff, if they thought that such notice had been given, otherwise for the defendant. The jury returned a verdict for the plaintiffs; and his lordship gave the defendants leave to move the Court to enter a nonsuit, if they should think that there was no evidence to go to the jury of due notice of the dishonour of the bills.

Hutchinson now moved accordingly. The letter was not evidence to go to the jury. It was for the Court to say, whether notice of dishonour could be inferred from it. It cannot be collected from the letter that due notice had been given of the dishonour of the bills, especially of that on *Fenton*. Though it should be considered to be an answer to a letter giving notice of the dishonour of either or of both the bills, it cannot be inferred that the notice was given in proper time, so as to be *due* notice; for the letter is dated six days after the bills became due, and purports

to be in answer to a letter from the plaintiffs, which had *that day* come to hand.

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LITTLEDALE, J.—It seems to me that there was quite sufficient evidence to go to the jury. Whether the defendants had notice at the proper time may be doubtful, as several days elapsed between the time when the defendants ought to have had notice, and the date of their letter. The defendants clearly admit that they had received *some* letter apprising them of the dishonour of a bill or bills, and calling upon them to pay the amount. The evidence seems to be quite sufficient with regard to *Phillips's* bill. With regard to *Fenton's* bill, it appears to me more doubtful whether there was sufficient evidence; but there was evidence for the jury, and I see no reason to be dissatisfied with their finding.

PARKE, J.—I am of the same opinion. The letter was evidence of notice of the dishonour of both bills. It is quite clear that the defendant had received a letter which referred to *Phillips's* bill. The case is different with regard to *Fenton's* bill; but as the beginning of the defendant's letter, in which they say, "We fully expected that *Phillips's* bill would have been paid," indicates that the letter received by them referred to more than that one bill, and as in the latter part mention is made of their having taken up bills of *Fenton*, I think there was sufficient evidence to go to the jury.

PATTESON, J.—I think it quite clear that the letter refers to both bills. The defendants say that they *expected* *Phillips's* bill would have been paid; and with regard to *Fenton's* bill, they say in effect, that they did *not suppose* that *Fenton's* bill would be paid, because they had already had to take up return bills of his.

Lord DENMAN, C. J.—I was bound to submit the ques-

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tion to the jury, and I think they were right in their finding. At the same time I must say, that I should not have regretted a contrary finding. It is a slovenly way of doing business, to leave to inference that of which direct proof may easily be had.

Rule refused.

TURNER v. PYNE.

B. gives *A.* a cognovit, by the terms of which the debt and costs are to be paid by instalments, and in case of any default the whole to be leviable, *C.*, as surety, undertaking that *B.* shall attend at a certain place within seven days after any notice requiring such attendance, so that in the event of any instalment not being discharged before the time appointed for such attendance, a ca. sa. may be executed.

Default being made and notice given, *B.* attends and offers to surrender, but obtains time from *A.* for the payment of the instalment then due.

Held, that the undertaking of *C.* is discharged.

ASSUMPSIT upon a guarantee. Plea: the general issue. At the trial before *Denman*, C. J., at the sittings at Guildhall, after last Hilary term, the following fact appeared:

An action had been commenced by the plaintiff against one *T. Manning*, in which it was arranged that the plaintiff should accept a cognovit for the payment of debt and costs by instalments, upon the present defendant's giving an undertaking to be answerable that *Manning* should be forthcoming in case of non-payment. *Manning* accordingly gave a cognovit, in which it was stipulated that the judgment should not be entered up unless default were made in payment of 37*l.*, debt and costs, viz. 5*l.* part thereof, on the 15th June then next, and the like sum on the 15th day of each succeeding month, until the whole of the 37*l.* should be paid; but in case default were made in payment of any (*a*) of the said instalments, the plaintiff should immediately be at liberty to enter up judgment for the whole of the 37*l.*, or so much thereof as should then remain unpaid, and levy for the same, together with all costs and incidental expenses. At the same time, in further

(*a*) The words of the cognovit were "any or either of the said instalments." But as "any" applies to one or more out of several,

and "either" denotes one out of two, the insertion of the words "or either" is inoperative as well as grammatically incorrect.

pursuance of the agreement, the defendant, who was the attorney of *Manning*, signed the following undertaking:

"In consideration of the above-named plaintiff's allowing the above-named defendant time for payment of the debt and costs in this action, amounting to 37*l.*, and also in consideration of the plaintiff's accepting from the defendant a cognovit actionem, bearing even date herewith, for the payment of the said debt and costs, by the monthly instalments of 5*l.* therein mentioned, I, the undersigned, do hereby undertake and agree to and with the plaintiff, that the defendant shall personally attend at the office of Messrs. *Dover and Lawrence*, at &c., within seven days after any notice requiring such attendance shall be given to me, or left at my office. And I hereby undertake and agree, that the said plaintiff shall be at liberty to name in such notice, if he pleases, the seventh day, at two of the clock in the afternoon, for the attendance of the said defendant at the place aforesaid, so that in the event of any of the instalments of 5*l.* mentioned in the cognovit not being previously discharged, a writ of *capias ad satisfaciendum* to be issued upon the judgment, to be entered up on the said cognovit, may be duly executed. And in default of the defendant's attending at the place and time and in the manner stipulated, I undertake to pay the said debt and costs, and all subsequent costs occasioned by the non-payment thereof, or of any of the instalments thereof, as aforesaid. And I make this undertaking absolutely, it being the intention thereof, that in the event of the said defendant's being from any cause privileged or protected from arrest at the time to be mentioned in such notice as aforesaid, the amount of the debt and costs, and all subsequent costs, shall become payable by me. As witness, &c."

The first instalment becoming due on the 15th June, 1832, and not being then paid, the plaintiff's attorneys, on the following day, sent to the defendant a notice requiring the personal attendance of *Manning* at their office on June 23, at two o'clock p. m., in order that the latter might be

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taken in execution for the debt and costs. In the meantime judgment was entered up and a ca. sa. issued. *Manning* not appearing at Messrs. *D.* and *L.*'s office at the hour appointed, they, on the 25th, sent to the defendant a notice that *Manning* had not appeared at their office pursuant to the notice given to him (the defendant), according to his undertaking, and requiring payment of the debt and costs. *Manning* subsequently paid the first instalment of 5*l.*, but made default in payment of the second. A notice was sent to the defendant as before, requiring the appearance of *Manning* on a certain day and hour, but *Manning* did not attend at the hour appointed or pay the instalment; whereupon a notice similar to that of the 25th June was sent to the defendant, and the present action eventually commenced.

Manning and another witness, who were called on the part of the defendant, stated, that at one o'clock, on Saturday the 25d June, they went to the office of Messrs. *D.* and *L.*, when *Manning* said that he had come for the purpose of surrendering himself in discharge of *Pyne*: that *Lawrence* then said, that he had no wish to take him (*Manning*), provided he could procure payment for the money due; and that it was eventually agreed between them that *Manning* should have five days time allowed him for payment of the instalment of 5*l.* On the 25th of the same month, *Manning* again called at the office of *D.* and *L.*, and said that he had come for the purpose of surrendering himself; and on that occasion *D.* and *L.* said they had no wish to take him, and that they should be satisfied if the money were paid in a week. *Manning* paid the 5*l.* accordingly. Under these circumstances the Lord Chief Justice was of opinion that the defendant had performed his undertaking by having *Manning* at the office of Messrs. *D.* and *L.* ready to surrender himself, and that by the dispensation on the part of the plaintiff's attorneys the defendant was discharged. Un his lordship's direction, the jury found a verdict for defendant. Leave was, however, given to the plaintiff

move to enter a verdict for 36*l.* 17*s.*, if the Court should think that the defendant continued to be bound by the undertaking.

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Sir *J. Scarlett* now moved accordingly. The defendant was not discharged by the giving of time to the principal for payment of an individual instalment. He undertakes that the principal shall attend as often as *any* of the instalments shall become in arrear, and *any* notice requiring such attendance shall be given to him.

LITLEDALE, J.—The principal was once produced, and this, I think, quite satisfied the undertaking. The cognovit says, that in case default be made in payment of any of the instalments, the plaintiff may enter up judgment for the whole debt and costs, or so much thereof as shall then remain unpaid, and levy for the same. So that there is to be only *one* execution, which may issue when any one instalment becomes in arrear. The defendant undertakes that the principal shall attend within seven days after *any* notice requiring such attendance. It is said that by this he guarantees the attendance of the principal, toties quoties. But I think that is not so. The word "*any*" may mean *several* or *one*, according to the subject-matter. Here, the cognovit does not authorize a taking in execution toties quoties; but in case of default in any payment, it authorizes one execution to be issued for the whole. But, as there may be no goods to satisfy the execution, the defendant undertakes to be answerable for the personal attendance of the party at the time when such execution may issue. The execution could not issue for the 5*l.*, but must either issue for the whole that remained due or not issue at all. The defendant could only be required to produce him once, and having done so in pursuance of the requisition sent to him, he is discharged from all further liability.

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PARKE, J.—I am of the same opinion. *Pyne* put himself in the situation of bail. Under the cognovit there could only be one execution. The undertaking gave the plaintiff an election to issue execution under the cognovit, or to call upon *Pyne* to produce *Manning*. He elected to call upon *Pyne* to produce, and *Pyne*, by tendering *Manning*, performed his undertaking. If *Pyne* had himself paid the first instalment after this notice, he could not have prevented the execution, for the execution is to be for the whole. It was then too late.

PATTESON, J.—As far as I can see into the agreement, the situation of *Pyne* is this. He says, “I will not bind myself to pay the money in the first instance, but *as soon as* any default is made by *Manning*, I will produce him; and if I do not then produce him, then I will pay the whole debt and costs.” If the cognovit had authorized *Manning*’s being taken from time to time in respect of each instalment, the case would have been different (*a*). Here, he is to be taken for all at once.

Lord DENMAN, C. J.—It appeared to me to be the true construction, that when the party was once surrendered, the defendant’s undertaking was discharged. In that opinion I am now confirmed.

Rule refused.

(*a*) And see *Davis v. Gompertz*, *ante*, vol. ii. 607.

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The GOVERNORS &c. of the Poor of the City of BRISTOL
v. WAIT and others.

REPLEVIN. The defendants, as overseers of the poor of the parish of St. Philip and St. Jacob, in the county of Gloucester, avowed for poor-rates, under 43 *Eliz.* c. 2, s. 19, To this avowry the plaintiffs pleaded in bar, first, *de injuriâ*; secondly, that the defendants distrained the goods of the plaintiffs as an entire distress for four poor-rates, in one of which, made on 22d March, 1832, the plaintiffs were rated in respect of a supposed occupation of a building called the Armoury, in the parish aforesaid, which building they did not, at the time of making the rate in question, occupy, and in respect of which they were not ratable. The defendants replied, confessing that the plaintiffs' goods were taken as a distress for four rates, (which are set out, and from which it appeared that the rate of 22d March was partly in respect of a supposed occupation of the Armoury); and averring that the plaintiffs occupied the premises in respect of which they were rated; that notice of the rates was given to them, and payment of each of them demanded and refused; that the plaintiffs were duly summoned to appear before certain justices to shew cause why they refused to pay the several rates; that they appeared accordingly, when the demand of payment was proved, and no sufficient cause for non-payment shewn; that thereupon the said four rates being wholly unpaid, the justices made and issued *four several warrants* of distress, for the levying of the four several rates, which were delivered to the defendants, as overseers, &c.: and that by virtue of the said *four warrants* they took and detained the goods of the plaintiffs in the name of a distress, for and by reason of the non-payment

Where a party is rated to the poor in respect of property not in his occupation, he is not bound to appeal, but may replevy any distress taken for such poor-rate.

So, if *part* of the premises included in the rate be not occupied by him.

But if one distress be taken under a warrant to levy the amount of a poor-rate, void by reason of such non-occupation, and also under a separate warrant to levy another *good* rate, the validity of such distress cannot be questioned in an action of trespass or replevin.

When, therefore, to an avowry for several poor-rates the plaintiff pleaded in bar that

one of the rates was in respect of property not occupied by him, a replication stating that such distress was made under several warrants for the several rates, was (upon a demurrer to a frivolous rejoinder) held to be good.

If more goods are seized than would be a reasonable distress for the *good* rate, the remedy of the distreinee is, case for an excessive distress.

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of the four rates. The plaintiffs rejoined, reasserting the facts shewing the illegality of the rate of 22d March. Demurrer and joinder in demurrer. Upon the other avowries, and the pleadings thereto, the same question ultimately arose by demurrer, as arises upon the first avowry.

The demurrers were argued in last Hilary term, by

First point:
 Entire dis-
 tress.

Maule, (with whom was *Maclean*.) for the plaintiffs. There is only one question raised upon this record. The defendants took certain goods belonging to the plaintiffs as a distress for poor rates, under four several warrants of distress, signed by the magistrates. Four rates had been made on different premises. One of those rates was bad, as the plaintiffs did not occupy *some* of the premises on which the rate was made. The question therefore is, whether the defendants could take one entire distress for four rates under four warrants, one of the rates distrained for not being due. The only ground upon which it can be contended that the defendants were justified in making the distress is, that as there were four separate warrants, although one was illegal, the defendants can justify the distress under the other three, which are legal. The distress, however, was *entire*, and it is the same as if the distress had been made under the authority of one warrant for the four rates. In *Milward v. Caffin* (a) it was held, that an entire distress under one warrant for two rates, one of which was illegal, could not be supported. *Milward v. Caffin* was recognized in *Hurrell v. Wink* (b). Here, all the goods are taken to satisfy *all* the rates. In *Hurrell v. Wink*, the distinction is pointed out between a distress for rent in arrear, and a distress for poor-rates. [*Taunton, J.* Upon an avowry for rent in arrear, the question is, whether *any* rent is due.] It is not denied that four duties may be jointly distrained for, provided they are all due, but in this case one was not due.

Second point:
 be-

It is true also that it is said that a party may distress

(a) 2 W. Bla. 1330.

(b) 2 B. Moore, 417; 8 Taunt. 369.

for one cause and avow for another (*a*). The meaning of this however is, that a party is not bound by what he *says* at the time he makes the distress, provided he really has an authority to make the distress. To support the defendant in this case, it must not only be said that he distreined for one cause and avowed for another, but he will be allowed, after he has admitted on the record that he took the distress for one cause, to justify the taking for another. In *Lucas v. Nockells* (*b*), which may be quoted on the other side, the doctrine that a party who has a legal authority may justify a seizure not in fact made under that authority, received some qualification. Either the four warrants do not authorize a joint distress, or if they do, it is the same as if the authority to distrein for the four rates was contained in one warrant. A warrant for four rates, one of which is illegal, would be bad. A party distreined upon ought to have an opportunity of redeeming his goods, upon payment of what is really due. Here, the party could not have his goods restored to him, unless he paid the amount of the illegal as well as the legal rates. In *Rogers v. Birkmire* (*c*) it was held, that a party cannot justify the taking of a joint distress for two separate rents.

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Follett, (with whom was *Justice*,) *contra*. The plaintiffs are admitted to be occupiers. They are rated for some

(*a*) After the removal of a plaint in replevin into a superior court, the plaintiff cannot plead in bar to the avowry that the defendant avowed in the inferior court for a different cause; T. 20 E. 3, Fitz. Abr. tit. *Avowry*, pl. 130. And see *Butler and Baker's* case, 3 Co. Rep. 26 b; *Gwinnett v. Phillips*, 3 T. R. 645; *Crowther v. Ramsbottom*, 7 T. R. 654; *Etherton v. Popplewell*, 1 East, 142.

(*b*) 4 Bingh. 729; 10 Bingh. 137. If in a plea in bar to a cog-

nizance, the plaintiff traverse the allegation that the defendant was bailiff, and it appears that the defendant distreined in his own right, the issue must be found for the plaintiff, although the lord under whom the cognizance is made has adopted the distress, per *Gascoigne*, C. J. of K. B., H. 7 H. 4, fo. 34, pl. 1. And see H. 5 E. 2, Fitz. Abr. tit. *Estoppel*, pl. 258; T. 10 E. 2, Fitz. Abr. tit. *Avowry*, pl. 213.

(*c*) Ca. temp. Hardw. 245.

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premises which they do occupy, and for others which they do not occupy. The proper course would have been to appeal, and not to bring an action of replevin. *Marshall v. Pitman* (a) is in point. There the plaintiff, who was a surgeon, was an inhabitant and occupier of land within the parish; he was assessed to the poor for the land, and also for his stock in trade. He paid the assessment on the land, but refused to pay the sum assessed on the stock in trade. The defendants distrained under a warrant, and the plaintiff replevied. The Court of Common Pleas held that replevin did not lie, and that the party ought to have appealed. It is submitted that this is the proper distinction, that when a party is liable to be rated, the validity of any particular rate must be tried by appeal; but where the party is not liable to be rated at all, he may bring an action of trespass or replevin, if a distress under a rate be made upon him. [*Littledale, J.* Suppose the overseer in distraining does much damage, could not the party bring an action?] Whether the party may bring an action has always turned on the question whether he was liable to be rated; *Weaver v. Price* (b). [*Denman, C. J.* A party distrained upon may appeal, although he was not liable to be rated at all, and he may also bring an action. Have you any authority for saying, that because a party has a remedy by appeal, he may not also bring an action?]

Second point. There was in this case one entire taking. The defendant was justified in that taking under three of the warrants; and the only question that can arise, owing to the illegality of the fourth warrant, is, whether the taking was not excessive. If the defendants were justified in the taking under one rate, and have taken for all, an excessive quantity of goods may have been seized, and thus the plaintiff may have been injured; but if that be so, his remedy is not in this form of action. Suppose a party to have distrained for rent and a heriot, a title to either one or the other would be an answer

(a) 9 Bingh. 595; 2 Moore & Scott, 745.

(b) 3 Barn. & Adol. 409.

to an action of replevin. So here, if the defendants had any right at all, under any one warrant, to take the goods, he has an answer to this action. It is admitted on the record that the plaintiff had a right to distrein. [*Taunton, J.* The question is, whether the justifying under four warrants, of which one was bad, does not make the whole distress bad?—whether the illegality of the one does not pervade the whole?] The *valid* warrant pervaded the whole, and made the distress good. In the case of a defendant justifying under a good warrant of distress, is he to be liable to the action because he had also in his pocket a warrant which was bad? [*Patteson, J.* Here the fact appears upon the record, that the distress was made under four warrants, one of which was bad. How do you distinguish this case from *Milward v. Caffin*?] That was not a case of a joint distress under several warrants. There was in that case *one warrant* for one entire sum, and the question was, whether the *warrant* was good. The warrant was entire, and therefore, as it was bad in part, it was bad for the whole. In this case there are separate warrants. Suppose the warrants had been granted to four different persons—[*Patteson, J.* There would have been different seizures under each warrant; but here it might be said that by making one seizure under the four warrants, it was the same as if there had been but one warrant. This is like *Rogers v. Birkmire*.] The question is, whether the defendants are trespassers. All that appears upon the record is, that the defendants have taken the goods under four warrants of distress, one of which is bad:—why cannot the defendants have recourse in justification to the three warrants which are good? The goods of the plaintiffs were liable to be taken for something; and if more was taken than was sufficient to cover the sum due, the remedy is *case* for the excess. It does not, however, appear that more goods were seized than would have been taken if three warrants only had issued. If the three warrants are sufficient to authorize the distress, they are sufficient to support

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the justification. If a person has a warrant which is legal, and by which he is required to take a party into custody, and he has another warrant which professes to be legal, but in truth is not so, and he assumes to take the party under both warrants, would he be a trespasser? [*Taunton*, J. How can it be said in this case, how much was taken under the bad warrant, and how much under the valid warrant?] That furnishes an argument for the defendants. If it could be said that any portion was taken under the bad warrant, the distress would be bad. [*Denman*, C. J. If the marginal note in *Marshall v. Pitman* were correct, it might be impossible to distinguish that case from this.] The marginal note properly represents the case. If the defendant had distreined, saying that he distreined under the illegal warrant, he might yet have justified, if he had any other which is good. Yet it is now contended, that because the defendant justifies under the bad warrant, coupled with the valid warrant, the justification cannot be maintained. The only point is, whether the defendant was justified in taking the goods; if he was so, replevin will not lie. It is to be remarked, that the defendant does not justify under the bad warrant. It is the plaintiff, who in his replication states that the distress was made by virtue of four warrants, one of which is bad. The defendants' justification is under the general avowry given by the statute of *Elizabeth*. It is the same as if the defendant had justified under the three good warrants, and the plaintiff had replied the bad warrant. If no more was taken than was sufficient to satisfy the three legal warrants, the party has sustained no injury. If more was taken, the remedy is by an action on the case. The books are full of cases which decide that if a party be legally authorized to distrein, any thing he said at the time of making the distress is immaterial.

The COURT postponed the hearing of the reply to a subsequent day in the same term, and gave permission to Fol-

lett to furnish the Court on that day with other authorities, with which he stated that he should be prepared.

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Follett accordingly on that day cited the following authorities: 2 Roll. Abr. *Replevin*, M. pl. 4, 5, 6, 8; *Syliard v. ———* (a); *Miller v. Green* (b); Anonymous case in *Godbolt* (c); *Butler and Baker's case* (d); *Crowther v. Ramsbottom* (e); *Groenvelt v. Burwell* (f); *Bacon's Abr. Replevin*, R.; 17 *Geo. 2*, c. 38, s. 8; *Sturch v. Clarke* (g).

Maule, in reply. As to the first point made by the defendant, that the remedy of the plaintiff was not by action, but by appeal: it is controverted, for the first time, that a person who is legally rated for some premises, but illegally for other premises, cannot treat the illegal rate as a nullity and bring trespass for the distress. It is a general principle of law, that if a party exceeds his authority, he is not only a trespasser for the excess, but for the whole. If, to an action of trespass, an authority is pleaded, which authority has in fact been exceeded, the proper way of pleading the excess is by replication, and not by way of new assignment. In *Milward v. Caffin* there was a distress for one rate, which was valid, and for another rate, which was invalid; and it was held that the distress was illegal, and that trespass might be maintained. Wherever trespass de bonis asportatis may be brought, replevin may be maintained. Replevin lies for any wrongful taking. *Milward v. Caffin* establishes also this proposition, that if a person be rated for premises of which he occupies only a part, the rate is bad altogether. [*Patteson*, J. I think you can hardly say that it establishes that. The decision proceeded on a different ground.] At all events it establishes this, that

(a) 1 Bulstr. 101.

(e) 7 T. R. 654.

(b) 8 Bingh. 92; 2 Crompt. & Jerv. 142.

(f) 1 Lord Raym. 466; 12 Mod. 381.

(c) P. 109.

(g) *Ante*, vol. i. 671; S. C. 4

(d) 3 Co. Rep. 25.

Barn. & Adol. 113.

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the party is not put to his appeal only. That case is confirmed by *Hurrell v. Wink*. In *Marshall v. Pitman* (a) the plaintiff was an inhabitant, and had a stock in trade, and his objection was that he was *over rated*. He was in possession of ratable property. The only objection was to the *quantum* of the rate; and in such case, undoubtedly, the remedy is by appeal. That case does not therefore furnish an authority for saying that in *this case* the plaintiff's only remedy was by appeal. Mr. *Follett* has also cited upon this point *Weaver v. Price* (b), which shews that where a party who is distrained upon for poor rates has no ratable property at all, he may bring trespass; but it does not follow that a person, who has some ratable property, may not bring trespass where he is rated also in respect of property for which he is not ratable. If the exclusive remedy is by appeal, this inconvenience might arise.—A person who was liable to be rated, might be rated when at a great distance; the parties making the rate might wait until the time for appealing was past, and then levy the rate; and if the party had no remedy by action of trespass, he would be concluded.

Second point.

As to the second point, that the taking is justified by the three valid warrants. A party can only recover in the way in which he claims to recover. *Rogers v. Birkmire* (c) shews that although a party may have a justification which, if properly placed on the record, would avail him, yet if he does not properly plead the justification, it will be of no avail to him. In that case no complaint was made against the defendant which he could not justify, for he might have justified in respect of the rent reserved on account of the locus in quo. It is said that a man may distrain for one cause and avow for another. The proper and more correct way of stating the law is this; that a man may *say* he distrains for one cause, and may avow for another. The dicta cited shew this. In *Butler and Baker's case* (d) it is said,

(a) 9 Bingh. 595.

(b) 3 Barn. & Adol. 409.

(c) *Ante*, 361.

(d) 3 Co. Rep. 25.

"the law doth more respect an act without words than words without an act;" and then it is said, in relation to that which precedes, "that if a man takes a distress for one thing, yet, when he comes into a court of record, he may avow for what thing he pleases." The case in *Godbolt* goes no further. The passage in *Rolle's Abridgment*, Replevin M. (pl. 4), is, "If avowry be made for divers causes, and any are good, the avowant may justify." This is a general proposition, of which placita 5, 6 and 8 are only examples. These (which are, pl. 5, "rent service and rent charge,"—pl. 6, "rent due on several days,"—pl. 8, "rent, and rent nomine poenæ,") all reduce themselves to illustrations of the proposition which was admitted at the outset of the argument, viz. that in such a case as that of a party distressing for several half-years' rent, where some part only was due, the distress may be sustained, although in the avowry it appears that only a part was due. *Syliard v. ———* (a) amounts to the same thing. *Crowther v. Ramsbottom* (b) comes somewhat nearer to an authority. There, however, the question discussed was not properly raised. But, supposing the evidence as to what took place at the time of the seizure to have been admissible, the decision in that case amounts to nothing more than this; that if a man can shew that he had a legal justification for what he did, he is not bound by what he said at the time of making the distress. In *Groenvelt v. Burwell* (c) the defendants justified under a warrant from the College of Physicians: the plaintiffs replied de injuriâ; to which the defendant demurred specially. Lord *Holt* (d), who delivered the judgment of the Court, clearly intimates that where there are two warrants, the one good and the other ill, and the arrest is made upon the bad warrant, the party arrested may shew specially that he was arrested under the bad warrant, and therefore that the party arresting in such case would be

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(a) 1 Bulstrode, 101.

(c) 1 Ld. Raym. 454.

(b) 7 T. R. 654.

(d) Ibid. 465.

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answerable as for an illegal arrest; for Lord *Holt* did not mean to suggest that a party should plead specially that which would be a bad plea. [Lord *Denman*, C. J. That is very different from what he is reported to have said in 12 *Modern*.] Lord *Raymond* is a reporter of higher authority than the reporter in 12 *Modern*. [*Patteson*, J. When Chief Justice *Holt* goes on to say, "But if *Cole* had a good warrant at the time of the arrest, though he declared that he had arrested the plaintiff upon the warrant that was insufficient, yet, in an action brought against *Cole*, he might have justified under the good warrant, having had it in his custody at the time of the arrest, for the single question would be, whether he *had* good authority at the time of the arrest,"—he shews that his meaning in the former part was, that if the party was not at the time of the arrest armed with the legal warrant, it might be specially shewn. This makes the report in Lord *Raymond* perfectly consistent with that in *Modern*.] The dictum is more conformable to the old law in its direct sense. [*Littledale*, J. Suppose, in an action for trespass and false imprisonment, the defendant justifies under a warrant good upon the face of it, and you reply *de injuriâ*, can you prove that the defendant justified under another and an illegal warrant? How are you to get at the other warrant? I do not think you can.] The Court will recognize the distinction, which is simple out of Court:—Where a party arresting under a good warrant *says* that he is acting under a bad warrant, he shall not be concluded; but where in point of fact the distress is upon a bad warrant, it ought not to be supported, on the ground that the party had an authority which he did not use. [*Littledale*, J. How can you get at it? By special replication or by new assignment?] By a special replication that the distress was under a bad warrant. [*Littledale*, J. Would you not admit the matter of the plea?] The replication would be like the familiar one of excess. [*Littledale*, J. This would be in effect a traverse of the *virtute cujus*.] Although the *virtute cujus* may not be traversable *totidem*

verbis, yet it may be so substantially: *Lucas v. Nockells* (a). In the *Six Carpenters'* case (b) it is said, "Where entry, authority or licence is given to any one *by the law*, and he doth abuse it, he shall be a trespasser ab initio;" and the reason is thus given; "the law adjudges by the subsequent act, quo animo, or to what intent he entered." It is evident therefore that the purpose of the entry is in effect traversable. It cannot be traversed directly, but it may be so by stating specially the purpose for which the entry was made. There is a class of cases upon the writ of recaption which are applicable to this part of the subject. In the action of recaption, the only question, as appears from the form of the writ, was, whether the taking the second time was for the same cause as the first. In a note to *Fitzherbert*, Nat. Brevium (c), it is said "that where the lord in a replevin avows for one cause, and justifies the recaption for another cause, the plaintiff may aver that the first caption was made by him for the same cause as the second." In *Viner's Abridgment*, Replevin (E. a.) (d), it is said, "In replevin the defendants made conusance, as bailiffs, to A. for rent reserved upon a lease for life; the plaintiff replied that two strangers had a right of entry into the place where &c., and that by their command the defendants entered and took the cattle damage feasant *absque hoc*, that they took them as bailiffs to A.; and upon demurrer it was objected, that by this means the *intent* of the party shall be put in issue, which no jury can try, but only in case of recaption; but it was adjudged the traverse was well taken" (e). This is a conclusive authority; and it is to be remarked that there the second authority was put upon the defendants by the plaintiffs, in the way in which the fourth warrant is said to be put on the defendants in this case.

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(a) 4 Bingh. 729; 10 Bingh. 28 E. 3, 92.

157.

(b) 8 Co. Rep. 146.

(d) 19 Vin. 27, pl. 7.

(e) Citing *Buller's* case, 1 Leon.

(c) F. N. B. 72 (a), referring to 50.

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Lord DENMAN, C. J., in the course of this term delivered the judgment of the Court. After stating the pleadings, his lordship proceeded as follows:

The substantial question was, whether the defendants are entitled to a return of the goods distrained, having made one entire distress under four warrants, one of which ~~was~~ for levying a rate imposed for premises, part of which ~~was~~ not then in the plaintiff's occupation.

First point.

The defendants argued, in the first place, that this Court could not inquire whether a rate was properly imposed, the Court of Quarter Sessions having exclusive jurisdiction to determine that question. In support of this proposition, *Marshal v. Pitman* (a) was cited; and we think it proves no such thing. It only proves that an apothecary, possessing personal property in a parish where he inhabits, cannot treat as a nullity a rate wherein he is assessed in respect of his stock in trade, though he may be allowed to shew that he has no stock in trade, and though no other personal property but stock in trade has ever been rated in that parish. But as the act renders personal property ratable, the overseers have clearly a legal right to rate it, and to enforce payment of such rate by the ordinary means; and the party can have no remedy against an unfair or excessive rate, but by appeal. But in the present case a rate has been imposed on the plaintiffs in respect of land which they did not occupy, a rate which the overseers had no power to make, nor the magistrates to enforce. It is like a rate on land situate in a different parish, which, according to Lord Holt, (in *Groenvelt v. Burwell* (b),) is an illegal tax, which the justices have no power to confirm. The opinion of this Court to the same effect, was expressed by Lord Tenterden, in *Weaver v. Price* (c). But *Milward v. Caffin* (d) is in its very terms exactly similar to the present case, with this addition, that the sessions had there con-

(a) *Ante*, 362.

(b) 1 *Ld. Raym.* 471.

(c) *Ante*, 362.

(d) *Ante*, 360.

firmed the rate on appeal; yet it was held to be a nullity. And that decision is entitled to the more weight, because it was once questioned by Lord *Kenyon* (a) on another point (b), with respect to which however it has been upheld both by this Court and by the Common Pleas; but on this point it has never been impugned; and its principle was adopted in *Rex v. Welbank* (c).

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But it was argued that the distress was legal, inasmuch as a part of the premises assessed was liable to be rated, and that by including more the distress might indeed be excessive, so as to found an action on the case, but was not altogether void, so as to make the seizure illegal. Second point.

Numerous authorities were quoted to shew that a distress may be justified, though the distrainor profess to act under an illegal warrant, provided he were at the time armed with a lawful one. This doctrine was largely discussed in the late case of *Lucas v. Nockels* (d), which has been cited as an authority, but which seems to the Court inapplicable to this case. The proposition is however established beyond question, that an officer is not confined in Court to the authority which alone he may have produced when he acted; he may certainly resort to any authority which he possessed, that justified his proceeding. *Rogers v. Birkmire* (e) was the only decision which appeared to be at variance with this general doctrine. That was trespass for entering a house and seizing goods: the defendant justified under a distress for rent not only of the house, but also of a stable—the house and stable being held under separate demises, at separate rents. The plea was held bad, and being bad in part in respect of the place in which the goods were taken, and not being divisible, was clearly bad in the whole. Here, the action is replevin; three out of the four causes of taking were justifiable; there were four separate warrants; each

(a) 7 T. R. 270.

rates.

(b) As to the necessity of joining the justices with the overseers in actions for distressing for poor-

(c) 4 M & S. 225.

(d) *Ante*, 369.

(e) *Ante*, 360, 366.

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cause of taking was distinct; and the avowries being separate for each cause of distress, the plaintiffs cannot, by avowing that all were acted on at the same time, and that one was bad, invalidate those that were good. With this single exception, which is only an exception in appearance, the authorities are uniform. *Rolle's Abridgment*, Replevin M, pl. 4, 5, 8 (a), bears directly on the point, and is recognized in all the books. The pleadings therefore disclose a sufficient warrant to justify the seizure of the plaintiffs' goods, and entitle the defendant to have them returned, though an action may possibly be maintainable as for an excessive distress.

Judgment for the defendants.

(a) Translated 18 Vin. Abr. 594, pl. 4, 5, 8.

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 and others.

EJECTMENT for a public-house at Greenwich; the demise being laid in 1832. At the Kent spring assizes, 1833, a verdict was found for the plaintiff, subject to the following case:—
 15th September, 1812. *George Greenway*, being possessed of the premises for the remainder of a term of fifty-nine years, commencing at Christmas, 1801, bequeathed a house to *B.* for the residue of a term of years, if *B.* should so long live and continue to inhabit therein,—and after *B.*'s decease or giving up the possession, *A.* bequeathed the house to *C.*, the wife of *B.*, for the remainder of the term, in case she should so long live therein and remain the widow of *B.*; with further limitations to the issue of *B.* *B.* enters, with the assent of the executors of *A.* *B.*, being in insolvent circumstances, goes to sea for six months: *C.* continues to occupy the house and to carry on *B.*'s trade therein. During the absence of *B.* a commission of bankrupt issues against him. After his return, *B.* continues the occupation and the business until the house is sold by his assignees, when *B.* and *C.* are turned out of possession by the vendee. *B.* dies. *C.* remaining a widow, demands possession.

Held, that the bequest to *C.* did not in equity enure as a limitation to her separate benefit, and that her executory estate passed to the assignees of *B.*, as being such an interest as *B.* could "lawfully depart withal."

B.'s going to sea on account of insolvency, was not a ceasing to inhabit or a giving up of possession so as to defeat his life estate.

Nor his being turned out of possession, *semble*.

unto his grandson, *James Shaw*, his leasehold messuage and public-house at Greenwich, called the Rose and Crown, for all his (*Greenway's*) estate, interest, and term therein, in case *J. Shaw* should so long live and continue to inhabit the house; and from and after his decease, or giving up the possession of the premises, or in case he should mortgage the same, then *Greenway* bequeathed the same unto *Mary*, the wife of *J. Shaw*, for the remainder of the term, in case she should so long live therein and remain the widow of *J. Shaw*; and from and after her decease or marriage he bequeathed the same unto the children of *J. Shaw* then living.

Upon the death of *Greenway, J. Shaw* (with the assent of the executors) took possession of the premises, and continued to reside thereon until November, 1813, when, being in insolvent circumstances, he went to sea, leaving his family in the premises, in which his wife continued to carry on the business during his absence, which was about six months.

24th December, 1813. A commission of bankrupt issued against *J. Shaw*, after which he returned and resided with his family on the premises, and continued to carry on the business there until a sale thereof was completed by the assignees, when he and his family were turned out, and the vendee (under whom the defendants claim) took and retained possession.

4th August, 1831. *J. Shaw* died.

9th August, 1831. *Mary Shaw*, then and still the widow of *J. Shaw*, demanded possession of the premises.

The question for the opinion of the Court is, whether the interest which *Mary Shaw*, the lessor of the plaintiff, took under the will, passed to the assignees of her husband.

Platt, for the plaintiff. By the Bankrupt Act (a) nothing passes to the assignees except such property as the bank-

(a) 6 Geo. 4, c. 16, s. 12. So, under the former bankrupt acts.

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First point:
 Whether
 estate such as
 the husband
 might "law-
 fully depart
 withal."

rupt "may lawfully depart withal." The interest, or rather the possibility (a), which vested in the wife during the life of her husband, was not of such a nature as he could control or *depart withal*. It was plainly the intention of the testator that *Mary Shaw* should have the remainder of the term in the event of her surviving her husband. The greatest extent of the estate of the husband was for his life. The interest bequeathed to the wife was not such as he could reduce into possession. This is the test of the husband's right to the wife's personal property. It is true that in *Coke upon Littleton* it is said (b), "If a man be possessed of a term of forty years in the right of his wife, and maketh a lease for twenty years, reserving a rent, and die, the wife shall have the residue of the term, but the executors of the husband shall have the rent; for it was not incident to the reversion, for that the wife was not party to the lease." But this was overruled by *Evans's* case (c). In *Coke upon Littleton* (d) there is also this passage; "If a lease be made to baron and feme for the term of their lives, the remainder to the executors of the survivor of them, and the husband grant away his term, and dieth, this shall not bar the wife, for that the wife hath but a possibility, and no interest" (e). In this case the wife had but a possibility, because she might not have survived her husband. *Matthew Manning's* case (f) establishes that this is a possibility only; and if it be a possibility, it cannot be granted: *Lampet's* case (g). If the Court hold that the husband had a right to convey away the interest of the wife, the intention of the testator will be defeated. The bequest not only limits the interest of the husband to a life estate, but also requires that he shall inhabit the house, and prohibits him from mortgaging it. These restrictions shew that the testator never intended that the husband should have the power of selling the wife's

(a) *Vide ante*, vol. i. 171, n.

(d) Co. Lit. 46 b; 3 Tho. Co.

(b) Co. Lit. 46 b; 3 Tho. Co. Litt. 308.

Litt. 306.

(c) *Ante*, vol. i. 171, n.

(c) *Ibid.* note 277. And see Popham, 125.

(f) 8 Co. Rep. 95 a.

(g) 10 Co. Rep. 46 b.

property. It is established, by a variety of cases, that a husband cannot convey away that in which the wife has not a *vested* interest, and which he therefore cannot reduce into possession: *Watkins on Conveyancing*(a), *Gage v. Acton*(b). Assuming therefore that there was not a sufficient residence by *J. Shaw* to satisfy the terms of the will, he could not have conveyed away the whole term, and therefore the assignees could derive no title to it through him.

II. The departure of *J. Shaw* was not a ceasing to inhabit within the meaning of the will. *J. Shaw* went away, but his *family* remained. He was an *inhabitant* of the parish for all legal purposes. It could not have been the meaning of the testator that he should not *leave* the premises, even with the intention of returning. The object which the testator had in view was to provide that the occupation of the premises should be secured to his family. Had *J. Shaw* given up his business and taken away his family, he would have ceased to inhabit within the meaning of the will. The length of the absence can make no difference if he intended to return. He did actually return. The presumption therefore is, that he left the house with the intention of returning.

Besides, who is to take advantage of the forfeiture? Persons who have executory interests are not obliged to take advantage of the first forfeiture. Can it be said that upon the husband's departure the wife's interest became vested, and that upon his return he took possession, not of his own, but of the estate vested in her? [Lord *Denman*, C. J. Can a wife take advantage of the husband's forfeiture?] It would be singular if the same person could both commit an act of forfeiture, and take advantage in right of his wife, for his own benefit, of the forfeiture thereby incurred. By executing a mortgage, would *J. Shaw* have forfeited the estate and revested it in himself in right of his wife? It was not the intention of the testator that the husband should be able to increase his own estate. The very

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Second point:
As to the residence.

Third point:
Consequences
of forfeiture.

(a) Edition by Merrifield, 202.

(b) 1 Salk. 325.

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act by which it is contended that he has increased his estate, was the act upon which it was intended by the testator he should lose the property.

Residence.

Campbell, A. G., contra. On the part of the defendants it is conceded that this is an executory bequest of the term to the wife, and that unless the husband could assign her interest, the term did not pass to the assignees. But the husband *could* assign it, because his interest in the term was determined, and his wife's interest had vested in possession. The estate was bequeathed to the husband, so long as he resided upon the premises. It was a conditional limitation of the term to the husband, and it was the intention of the testator that the residence should be an actual personal residence of the husband. In *Rex v. Galliers (a)*, *Buller, J.* says, "Suppose a lease were made for twenty-one years, on condition that the tenant shall so long continue to occupy the land personally, there could be no objection made to such a condition, for the personal confidence is the very motive of granting the lease." The testator must have meant to require an absolute, not a constructive residence, as when the husband ceased to reside, the wife was to reside there. The case finds that *J. Shaw* continued to reside *until* November, 1813. It may be taken that after that period he ceased to reside. It is not found that *J. Shaw* had *animus revertandi*. [*Taunton, J.* It is found that he went abroad in consequence of insolvency. *Patteson, J.* This cannot be said to be a giving up of possession.] It was a ceasing to reside. [*Littledale, J.* Is not this in the nature of a bequest to the separate use of the wife?—such a bequest to the wife as a Court of Equity would prevent the husband from interfering with? If so, the assignees can have no claim to the term, as they can only take what the husband would have taken beneficially.] The case presents another view in which it would appear that the wife's estate vested. If the estate did not determine

(a) 2 T. R. 140.

before the husband's bankruptcy, it did so afterwards, because the husband and wife were turned out of possession, and continued out of possession for twenty years. [*Taunton*, J. That is in consequence of a wrongful act. It is found that the assignees turned them out.]

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Assuming that the estate of the wife did not vest, but that the estate of the husband continued, the interest of the wife was such as the husband could assign. The husband is entitled to all the chattels real of the wife. If the chattel be given to the wife upon a contingency, and the event *may* happen during the coverture, the husband has a right to assign it, but not where the event *cannot possibly* happen during the coverture; *Higden v. Williamson* (a). [*Taunton*, J. The cases on this subject are collected in *Comyns' Digest*, Chancery, 2 (M. 9.)] There are several cases in which it has been held, that the husband is entitled to a term held in trust for his wife; Sir *Edward Turner's* case (b), *Tudor v. Samyne* (c), *Precedents in Chancery*, 419. In *Bates v. Dandy* (d), Lord *Hardwicke* says, "That as the husband may assign the wife's term, so he may the ~~trust~~ of the wife's term, unless it be a part of a term *from him* for the wife's benefit. The husband may assign the wife's chose in action, or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary, but for a valuable consideration." In the argument in *Dalbiac v. Dalbiac* (e), it was said, "It has been lately held here, that a reversionary interest which the husband could not reduce into possession during his life, he could not assign;" upon which Sir *W. Grant*, M. R., observed, "that is, if it could not fall into possession during his life, as a reversion upon his own death; not if it depended upon an event which

Power of husband to assign.

(a) 3 P. Wms. 132. And see *Ves. & B.* 118; *Purdew v. Jackson*, 1 Russell, 1.
Fraser v. Bayley, 1 Bro. C. C. 518;
Richards v. Chambers, 10 Ves. 580;
Woollands v. Crowcher, 12 Ves. 174;
 note to *Butler v. Duncombe*, 1 P. Wms. 448; *Hornby v. Lee*, 2 Madd. 16; *Lee v. Muggeridge*, 1

(b) 1 Vern. Rep. 7.
 (c) 2 Vern. Rep. 270.
 (d) 2 Atk. 208.
 (e) 19 Ves. 122.

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might happen during his life;" *Mitford v. Mitford* (a). The cases on this subject are collected in a note to *Coke upon Littleton* (b). The authorities cited on the other side are reconcileable with the view of the case taken by the defendants. As to the case put by Lord Coke (c), of a lease made to baron and feme for terms of their lives, the remainder to the executors of the survivor, there the wife's interest cannot by possibility vest during coverture. *Matthew Manning's* case is only an authority to shew that after a term of years has been limited to one for life, it cannot be limited over by way of remainder, but only by way of executory devise. *Lampet's* case is an authority for the defendants. There, a term for 500 years was devised to *John Morrice* for life, and after his decease to *Elizabeth*, the sister of the testator, and the heir of the body of *Elizabeth*. The testator died, *John Morrice* entered, *Elizabeth* married, and she and her husband released to *John Morrice*. It was held that *Elizabeth's* interest passed by the release. Whether the bequest of the term in this case is to the separate use of the wife, is a question which belongs to a Court of Equity. [*Taunton, J.* That which the bankrupt has as trustee, does not pass to his assignees (d).] But this Court cannot declare the husband trustee. If at law, the interest of the wife can be assigned, it passes to the assignees. In *Gage v. Acton* (e) there is a dictum of *Holt, C. J.*, as follows: "Where the wife hath any right or duty, which by possibility may happen or accrue during the coverture, the husband may by release discharge it; but when the wife hath a right or duty, which by no possibility can accrue to her during coverture, the husband cannot release it."

First point.

Platt, in reply. From the language of the bequest it is evident that the testator never contemplated that the hus-

(a) 9 Ves. 98.

(b) Co. Litt. 351 a, note (1).

(c) Co. Litt. 46 b.

(d) *Carpenter v. Marnell*, 3 Bos-
 & Pul. 40.

(e) 1 Salk. 326.

band and wife would live apart. The husband continued for all parochial purposes an inhabitant of the parish.

Then as to the husband's right to assign the interest of the wife, and the jurisdiction which a court of equity would exercise over this species of property. In *Richards v. Chambers* (a), property was settled in trust for the separate use of the wife for life, and if she survived her husband it was to be hers absolutely: if the wife died in the husband's life-time, it was to go to such person as she by deed or will should appoint, and in default of appointment, to her executors and administrators. The wife made an appointment to the husband, and it was held that there was no jurisdiction in equity, even by consent of the married woman, to assign this property to the husband. There are many authorities collected in *Com. Dig. Assignment*, (C. 3,) which militate against the position contended for by the defendants. *Higden v. Williamson* has no application to the present case. *Dalbiac v. Dalbiac* shews that if the estate does not vest the husband cannot assign. As the wife's interest in this case could not vest in the husband, Mr. *Butler's* note (b) is in favour of the lessor of the plaintiff. In *Lampet's* case (c), the wife's interest was to vest not as in this case, upon the death of the husband, but upon the death of *John Morrice*. The estate might therefore have vested in the husband's life-time. If the proposition relied on by the defendant be correct, the husband, by his own wrongful act, will have increased his estate.

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Second point.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the terms of the bequest, and the other facts of the case, his lordship proceeded as follows:

We are perfectly clear that the husband's going to sea does not amount to giving up possession of the premises,

(a) 10 Ves. 580.

(c) 10 Vesey, 580.

(b) Co. Litt. 351 a; *ante*, 378.

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and we think it at least extremely doubtful whether his being turned out of them can satisfy those words, which seem to imply a voluntary desertion. But the defendants rested their claim on another more general ground, contending that as it was possible that the contingency on which the wife was to take might happen during the coverture, the term became the absolute property of the husband, and consequently vested in his assignees.

According to the old law, a term for years given to *J. S.* for a particular estate, with remainder to others, vested in *J. S.* absolutely, notwithstanding the gift over. In many cases, however, courts of equity have interposed for the protection of married women, to whom such remainders have been limited. And inasmuch as the assignees of a bankrupt take only such interest as he could have lawfully departed withal, the duty of inquiring in what manner a court of equity would deal with similar dispositions of property, may devolve incidentally on a court of law (a). If then we clearly saw from decided cases, that the wife's right to take under this devise is kept alive during the husband's life, and that the estate vests in her upon his death, we might perhaps be bound to decide by the same rule. But we find no authority for this position. On the contrary, the result of all the cases (which are collected in *Mr. Butler's* note (b) to *Co. Litt.* 351 a) appears to be, that a devise like the present would not be construed in a court of equity to enure to the separate benefit of the wife.

Judgment for the defendants.

(a) Vide *Carpenter v. Marnell*, Co. B. L. 403, 6th ed.
 3 Bos. & Pull. 40; *Chion*, ex parte,
 3 P.Wms. 186, n.; *Copeman v. Gal-*
lant, ib. 314; *Gerard v. Aylmer*,
Palmer, 505; *Webster v. Scales*,

(b) Note 304. The second part
 of this note, "*If the wife survive*
the husband," is remoulded in the
 16th edition.




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ASSUMPSIT by the off-going tenant against his landlord. The first count was for the value of grass seeds sown, and lime and manure spread upon the farm by the plaintiff. The second count was for grass seeds sown and fallows performed. The third count was for grass seeds sown, and for lime spread on the land. The fourth count was as follows: and whereas the plaintiff, before and at the time of the making of the promise and undertaking hereinafter next mentioned, held a certain farm as tenant thereof to the defendant, which farm the plaintiff was about shortly after to give up the possession of to the defendant, and had advertised for sale by public auction the stock, goods and chattels of him the plaintiff, then being upon the said farm, of which the defendant afterwards, to wit, on &c., had notice; and thereupon in consideration that the plaintiff had then and there paid to the defendant all the rent due and to become due up to the time when the tenancy of the plaintiff in his said farm would expire, the defendant undertook &c. that he the defendant, as landlord of the said farm, would not interfere with or prevent his said intended sale of his said stock, goods and chattels, in and upon the said farm, or the removal thereof from the said farm, but would permit and suffer the plaintiff, or the respective persons that might become the purchasers thereof, quietly to remove the same from the said farm. And the plaintiff avers, that the plaintiff offered for sale, by public auction, his said stock, goods and chattels, then being in and upon his said farm; and that the defendant, whilst the said sale was going on, gave notice to the persons attending such sale, that he the defendant, as landlord of the said farm, would not permit or suffer the purchasers of goods at such sale to remove them from the said farm, contrary to the said promise &c., whereby divers persons that were attending the said sale, intending

Where a tenant who is shortly about to quit his farm, advertises for sale by auction his stock, &c. upon the farm, his payment of rent already due and to be due at the expiration of his tenancy to his landlord, who has notice of the intended sale, does not raise an implied promise on the part of the landlord not to interfere with or prevent the sale, or the removal of the property.

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to become purchasers of the goods of the plaintiff, were hindered and prevented from bidding, as they otherwise would have done, and the plaintiff thereby not only lost a large sum of money, to wit, 200*l.*, which he otherwise would have received from the proceeds of such sale, but was also in consequence thereof greatly prejudiced in his trade and business of a maltster, which he then and there carried on, and divers persons who had before then given credit to him the plaintiff in such his trade and business, did, in consequence of the defendant's interfering to prevent the sale as aforesaid, refuse any longer to trust the plaintiff, to wit, at &c.

At the trial before *Alderson, J.*, at the Carlisle spring assizes in 1834, no *actual promise* to the effect of that alleged in the fourth count of the declaration having been proved, though the other material facts alleged in the count were shown to have occurred, the learned judge told the jury that he was of opinion that the loss occasioned to the plaintiff by the interference of the defendant at the sale, could not be recovered on the fourth count. A verdict was found for the plaintiff for the lime spread by him for 30*l.*, and the damage occasioned by the hindrance of the sale was estimated by the jury at 45*l.* The learned judge gave the plaintiff leave to move to increase the damages to 75*l.*

Blackburne now moved accordingly. The plaintiff was entitled to recover the damages occasioned by the hindrance of the sale. [*Parke, J.* No such promise as is alleged in the fourth count arises by implication from the payment of rent due.] Although the mere payment of rent when due might not raise the promise stated in the fourth count, yet a payment of rent before it was due was a sufficient consideration from which to imply such a promise.

By the COURT—

Rule refused.



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BOTCHERLEY and BOVILLE, Assignees of JAMES and
JOHN WHITEHEAD, v. LANCASTER.

TROVER. Plea: the general issue. At the trial before *Gurney, B.*, at the Lancashire spring assizes, 1834, it appeared that the action was brought to recover the value of certain goods levied by the defendant, who was a sheriff's officer, under a writ of *fi. fa.* for upwards of 300*l.*, issued at the suit of one *Head* against *James Whitehead*, one of the bankrupts. The proceedings under the commission not having been inrolled, the plaintiffs were called upon to prove the trading, act of bankruptcy, and petitioning creditor's debt; and in relation to an act of bankruptcy attempted to be proved by them, it became material to shew the state of the bankrupt's circumstances at the time when the levy was made. For this purpose the plaintiffs called the solicitor to the commission, who stated that he had with him the proceedings under the commission, and that from those proceedings it appeared that the amount of debts proved was upwards of 30,000*l.*, and he stated that the assets did not amount to one shilling in the pound. This evidence was objected to on the part of the defendant, but received by the learned baron. The plaintiffs having failed to establish the act of bankruptcy in respect of which the above evidence was material, put in evidence a deed, which purported to be an assignment of all the estate and effects of both the bankrupts, for the benefit of their joint creditors. This deed was executed by the bankrupts a few days only before the commission issued, but was not executed by any trustee or creditor, nor did it appear to have been in any way acted on. The learned baron thought that this assignment was an act of bankruptcy, and a verdict was found for the plaintiffs.

An assignment by a trader of all his estate and effects, for the benefit of all his creditors, executed by the trader, but not executed by the trustee or by any creditor, or further acted on, is an act of bankruptcy.

Whether the Court can, upon shewing cause against a rule for a new trial, entertain a question as to whether a deed amounted to an act of bankruptcy, where the rule nisi was obtained upon the ground of the improper reception of evidence to shew insolvency preparatory to proof of another act of bankruptcy, in which the parties failed at the trial, *quære*.

In Easter term, 1833, *F. Pollock* obtained a rule nisi for a new trial, on the ground that the evidence respecting the amount of debts was improperly received.

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Wightman now shewed cause. The only question for the consideration of the Court is, whether the deed of assignment executed by the bankrupts is an act of bankruptcy. It is a transfer of *all* the bankrupts' property for the benefit of all their creditors. The words of the statute are plain. The fourth section of the bankrupt act (*a*) makes a conveyance of all a trader's property by deed to a trustee, for the benefit of all the creditors, *where the trustee executes within fifteen days* after the trader, and both executions are attested by an attorney and notice in the Gazette is given, *not* an act of bankruptcy, unless a commission issue within six calendar months. It is evident from this section that the legislature intended that an assignment by a bankrupt of all his effects, for the benefit of all his creditors, should be an act of bankruptcy, unless when attended with all the formalities mentioned in the act. It never can be the policy of the bankrupt law to render it dependent on the will of a creditor whether the deed shall be an act of bankruptcy. If, as in *Marshall v. Barkworth* (*b*), it could have been proved that the act of bankruptcy was committed by collusion, the objection might prevail. Five days after the deed was executed, the commission issued. [Lord Denman, C.J. I doubt whether we are at liberty to consider this question. The rule was not granted upon this ground.]

F. Pollock, in support of the rule. It is submitted that the question, whether or not the deed was an act of bankruptcy, is still open to discussion. [Parke, J. Is there any question but that this is an act of bankruptcy? It was held to be such in *Pulling v. Tucker* (*c*).] The deed was a fraud on the bankrupt law. If a trader takes a precedent of a deed of assignment of all his effects, copies it, calls in a subscribing witness, executes it, and then places it quietly in his drawer to be used when occasion required, nothing

(a) 6 Geo. 4, c. 16.

Adol. 508.

(b) *Antr.*, vol. i. 279; 4 Barn. &

(c) 4 Barn. & Ald. 382.

would pass by that deed. It would be merely a colourable act of bankruptcy. The deed must be acted upon.

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LORD DENMAN, C. J.—I do not think the Court can enter into the inquiry whether the assignment in this case was an act of bankruptcy.

LITLEDALE, J.—I think the deed *did* amount to an act of bankruptcy.

PARKE, J.—I have no doubt that this is an act of bankruptcy. The learned Baron reports that the verdict proceeded on the ground that the assignment was an act of bankruptcy, and I think it clearly was such.

PATTESON, J.—I have no doubt that this was an act of bankruptcy; but I very much question whether this inquiry is open to us.

Rule discharged.

REX v. BLOXAM.

ONE *James Smith*, having been convicted by the defendant, a magistrate for the county of Warwick, under 5 Geo. 4, c. 83, s. 14, as an idle and disorderly person, appealed to the Warwickshire sessions, held in December, 1831; and upon the hearing of the appeal, the sessions *quashed* the

A case sent back to the sessions to be restated, must be heard *de novo*, as upon a new trial; and if a contrary conclusion is come to, they may make a new order accordingly.

A certiorari removing an order of sessions, which order, upon being sent back to the sessions for restatement, is reversed by them, does not operate to remove the *new* order of sessions.

The party complaining of the second order is the party who must remove it.

A certiorari does not lie to remove an order of sessions made more than six months previously, although the delay was occasioned by causes over which the prosecutor had no control.

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conviction, subject to a case for the opinion of this Court. The defendant obtained a certiorari for the removal of the orders and proceedings of the sessions into this Court, and upon that occasion entered into the usual recognizance for prosecuting the certiorari. In April, 1833, this Court sent the case back to the sessions to be re-stated. At the sessions held in July, 1833, the appeal was *reheard*, and fresh evidence being adduced, the sessions *confirmed* the conviction, subject however to a case granted at the instance of the appellant. In Michaelmas term, 1833, the defendant obtained a rule to shew cause why his recognizance should not be discharged. In the same term, this rule was, upon the motion of the prosecutor, enlarged until the judgment of this Court should be given upon the re-stated order of sessions. In Hilary term, 1834, a period of six months having elapsed since the time of holding the sessions at which the conviction was confirmed, and no new certiorari having been obtained on the part of the prosecutor, to remove the orders and proceedings of those sessions; *Hill*, for the defendant, obtained a rule calling upon the prosecutor to shew cause why the rule of Michaelmas term, enlarging (until the judgment upon the re-stated order) the rule for discharging the defendant's recognizance, should not be discharged, and why the certiorari should not be quashed, and a *procedendo* awarded for carrying back the record of the conviction.

First point :
 Nature of order to re-state.

Amos and *Reynolds* now shewed cause. No new certiorari is required to bring up the second case. The session had no authority, when the case was sent back to them to be re-stated, to make an entirely new order. The session may go into fresh evidence in the same manner as is done in the case of a new trial, but the course which they should then pursue is to send back the original order, with a statement of the additional evidence. If the original order is still to be considered as an existing order, it is clear that the original certiorari is also sufficient to bring it back.

into this Court. Mr. *Nolan* says, that the rules of the King's Bench upon this point are not well established, but he states that where a case is sent back to be re-stated, the original order is a nullity, and that the justices at sessions may make a fresh order; and for this he quotes *Rex v. St. George, Southwark* (a), which, it is apprehended, does not go so far. In that case the sessions were directed to make further order thereupon, according as it should appear to them upon the merits. In *Rex v. Nether Heyford* (b), the case being sent back to the sessions to re-state, they returned a statement of the evidence, but there was no quashing of the original order. So, in *Rex v. Inhabitants of Bilsdale Kirkham* (c). [Sir *James Scarlett*, *amicus curiæ*. This question was mooted many years ago before Lord *Kenyon*, in a case in which I was on one side, as to whether the constable of Manchester could appoint a deputy. Lord *Kenyon* entertained no doubt but that the sessions must go over the whole case de novo, and it was fully understood that an order to re-state was similar to a rule for a new trial. There the sessions came to the same conclusion upon the second hearing, and therefore the same order stood, and was returned to the Court without a new certiorari. The Court, however, treated it entirely as a new trial.] [Lord *Denman*, C. J. It must be so. The magistrates may not be the same at the different sessions.] It is not denied that it is similar to a new trial with respect to the going into new evidence, but the question is, whether the sessions are authorized in making a new order; and it is submitted, that in doing so, the sessions have exceeded their authority.

But if the Court should be of opinion that the second order is valid, then comes the question, who is to remove the proceedings back into this Court? It is submitted that the new order must be sent up under the original certiorari, and the party who complains of the second order must

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Second point:
Which party
must obtain
certiorari.

(a) Burr. S. C. 283.

(c) Burr. S. C. 832.

(b) Burr. S. C. 479.

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move to quash it. Mr. *Nolan* is of this opinion (a). The Court will not order a procedendo to issue, the delay having been chiefly occasioned by the difficulty thrown by the defendant in the way of stating the case, and by the intimation of the Court in Michaelmas term, that the old certiorari would be sufficient.

Hill, contra. An order to re-state is equivalent to a rule for a new trial in every respect. Here, fresh evidence having been gone into on both sides, the sessions, upon the whole matter, reversed their former decision by confirming the conviction, and a case was obtained at the instance of the counsel for the appellant. The defendant, who has obtained the judgment of the Court below, is not to bring the case up, for the object of that proceeding is to quash, not to confirm, that judgment. The party desirous of quashing must bring the order up and enter into the recognizance to prosecute with effect. The original writ of certiorari is now spent.

LORD DENMAN, C. J.—By 13 *Geo. 2*, c. 18, s. 5, every certiorari to remove any conviction, judgment, order, or other proceedings, had or made before any justice of the peace or general or quarter sessions, must be applied for within six calendar months next after such judgment &c. shall be so had or made. Mr. *Chitty*, in a note to this statute, refers to authorities as shewing that the application must be made within six months from the time of the conviction or order, without regard to delay in conviction, drawing case, or otherwise. And, most undoubtedly, if we paid any regard to delay in these respects, we should repeal the provision. Parties must take care to exercise a proper diligence, and if they are not prepared within six months, there is no power in the Court to extend the time.

(a) Referring probably to 2 *Nolan*, p. 612, of the 4th edition.

Then it is said there is already a certiorari. That is the question. I think there is not. The party against whom the first decision was, removed the judgment because it was against him. In this case the defendant removed in order that he might quash the order of the sessions. The order is sent back to be re-stated, and that must imply a power in the sessions to re-hear and to enter again fully into the consideration of the case as upon a new trial. Upon the second trial the sessions came to an opposite conclusion. It cannot be said that the party who has prevailed at the second trial is bound to remove proceedings which are in his favour, merely because he had complained of the first trial; or that the writ of certiorari, which was obtained before the second trial, can have the operation of removing into this Court proceedings which had not taken place at the time when it was issued. It will very frequently happen that it will not be necessary to have a second certiorari, for if the second hearing convinces the magistrates that the first decision was right there will be no necessity for making a fresh order. But where the sessions come to an opposite decision, it seems to me that the party complaining of that decision must bring it into this Court. As that has not been done in this instance within six months, the party complaining cannot be heard now.

It does not appear to me that the rule as drawn up is capable of being carried into effect. We must, therefore, I think, discharge the whole of these rules, and leave the proceedings to stand as if nothing whatever had taken place since the confirmation of the conviction upon the re-hearing of the case.

LITTLEDALE, J.—The sessions having come to an opposite conclusion upon the second hearing, (to which in fact both parties consented,) it cannot be that the party who originally removed the proceedings ought to be compelled to bring them up again, or to have anything to do with them. The parties have changed sides, and I think that

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the party who is dissatisfied with the decision of the sessions ought to bring it up into this Court, if he wishes to have it questioned here. It seems to me that these rules should be discharged altogether.

PATTESON, J.—I do not acknowledge the distinction between *re-stating* and *re-hearing*, and if there be any such, I hope it will not prevail any longer. How is it possible for the sessions to re-state a case unless they re-hear it? The Court of Quarter Sessions is not composed each time of the same persons. The sessions could not possibly do otherwise than re-hear, and I think they were quite right in making the second order, if they thought differently from the former sessions. As the new order was different from the order made before, if we were to say that the same certiorari was to operate to bring it up, the party who had obtained that certiorari would be under a recognizance to bring up a judgment which is in his favour, the condition of which recognizance would then be, that he should pay the costs, unless he succeeded in setting aside a judgment in his own favour, which is absurd.

WILLIAMS, J. concurred.

Hill prayed that it might be made a part of the rule discharging all the former rules, that the defendant's recognizance should be discharged.

LORD DENMAN, C. J.—That is unnecessary, I think; but the rule may be so framed.

Rule accordingly.



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JOHN FARQUHAR FRASER, Esq. Administrator of JOHN FARQUHAR, Esq. deceased, v. The Company of Proprietors of the SWANSEA CANAL NAVIGATION.

TROVER for 45 barges, 1500 tons of coal, and 1500 tons of culm, belonging to the plaintiff as administrator. The trover and conversion were laid on the 20th of September, 1831. Plea: the general issue. At the trial before *Alderson, J.*, at the Glamorganshire summer assizes, 1832, a verdict was found for the plaintiff, subject to the following case:—

12th October, 1824. *James Cox*, (being lawfully possessed,) in consideration of 20,000*l.*, demised unto the intestate certain veins and mines of coal at Hendreforgan, in Glamorganshire, and all the messuages and buildings there-to belonging, habendum for the residue of a certain term, except the last day thereof; and also a certain wharf situate at Swansea, habendum for the residue of a certain other

A. is mortgagee of *B.* of certain leasehold coal-mines and barges, &c. *B.* afterwards demises the mines, and assigns the barges to *C.* *A.* may bring trover against *D.*, who tortiously seizes and sells the barges and part of the produce of the mines.

The seizure and sale were

for tolls claimed to be due to a Canal Company:—Held, that no injury resulted to *A.* until the *sale*; and that therefore an action brought within six months of the *sale*, but more than six months after the *seizure*, was not barred by a clause in the Canal Act, limiting the commencement of actions for any thing done in pursuance of that act to within six months *after the fact committed*.

Semble, however, that in an action by *C.* in respect of such seizure and sale, the period of limitation would have run from the time of the original seizure, whether the action were framed in trespass or in trover.

The Canal Act gives the Company tolls for all goods carried along the canal, which tolls, if not paid upon demand, they are empowered to recover by action; or they may seize the goods or other things in respect whereof such rates ought to have been paid, and the boat or other vessel laden therewith, and detain the same until payment of such rates, and all arrears due from the owner of the boats; and if such goods are not redeemed within seven days after the taking thereof, the same are to be appraised and sold as in case of a distress.

Held, that this clause does not empower the Company to sell the boats. Held also, that their right to seize is confined to the limits of the canal; and that, therefore, they are not authorized to seize goods after they have been landed.

C. having committed an act of bankruptcy after the seizure and sale, upon which a commission issued within two months of the seizure and sale: Held, that in trover by *A.* against the Canal Company to recover the value of the barges and coals, the Company could not set up the title of the assignees, under the 72d section of 6 Geo. 4, c. 16, even supposing them to have passed to the assignees under that section of the act.

Held also, that to entitle the assignees of a bankrupt under the 72d section, it is not sufficient to shew that the goods were in the order and disposition of the bankrupt, with the consent of a party who was permitted by the true owner to deal with them as his own, but that the consent must move directly from the true owner to the bankrupt.

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term, except the last day thereof; and also certain parts of the railway and waggon-way leading from Hendreforgan to the Swansea canal, habendum for 500 years; and he thereby transferred unto the intestate all the engines and machinery, and all the boats, barges, trams, &c. used upon the said mines, railway, canal, or wharf, or any of them, habendum unto the intestate, his executors &c. as his and their own goods and chattels, for ever; subject, nevertheless, to a proviso for redemption on payment of the 20,000*l.* and interest, on 12th October, 1827.

6th July, 1826, the intestate died. Administration was subsequently granted to the plaintiff. Default was made in the payment of the principal and interest at the day appointed by the indenture for payment of the same, and the whole of the principal sum, together with a large arrear of interest, still remains unsatisfied; whereby the estate and interest of the plaintiff, as administrator, on the 12th day of November, 1827, became absolute in law in the premises, and so continued up to May, 1830. Both the intestate, and the plaintiff as administrator, suffered *Cox*, the mortgagor, to continue undisturbed in the actual possession of the premises assigned by the indenture, and of all the engines, machinery, boats, barges, &c. used upon the same.

1st May, 1830, *Cox* agreed, in writing, with *Mercer & Co.* to grant them a lease of the veins of coal and culm at Hendreforgan, comprised in the indenture of mortgage, for a term, at certain rents. It was thereby also stipulated that the engines, boilers, engine-houses, waggons, trams, tram-plates, machinery, timber, materials, and things, in, under, and about the works at the colliery, and on the wharfs at Swansea, (being the premises comprised in the indenture of mortgage,) should be valued, and that *Mercer & Co.* should be considered the purchasers of so much thereof as should amount in value to 3000*l.* *Cox* was to determine what portion of the engines or other things, to the extent of the said sum of 3000*l.*, were to be the absolute property of *Mercer & Co.* *Mercer & Co.* agreed to pay 5 per cent.

interest on the excess of the proposed valuation beyond the 3000*l.* *Mercer & Co.* were to take possession, and the works were to be carried on by them from the date of the agreement, they paying all tolls, taxes, and outgoings thenceforth to become due upon working and conveying the coals and culm to Swansea; and *Mercer & Co.* were to be entitled to all advantages arising therefrom, although the name of *Cox* should be used in carrying on the same, *Mercer & Co.* engaging to indemnify him. *Mercer & Co.* also thereby agreed to take a lease of the wharfs at Swansea for a certain term, at a certain rent, to be paid with the rent of the colliery.

Immediately after entering into the above agreement, *Mercer & Co.* (who, until many months afterwards, had no notice that the intestate had any claim to or interest in the premises,) entered into the actual occupation and possession of the colliery, wharfs, plants, barges, &c. mentioned in the indenture and agreement respectively, and paid the price of the barges to *Cox*, on a valuation made in pursuance of the agreement. They continued in such occupation and possession as to the barges, coal, and culm, which were the subject of this action, until the seizure of them by the defendants, as hereinafter mentioned; and as to the residue of the premises, until the time of the bankruptcy hereinafter mentioned. During all that time *Mercer & Co.* were assessed to and paid all rates, taxes, and other outgoings in respect of the colliery, &c. Previously to the time when *Mercer & Co.* entered into possession as aforesaid, the name of *James Cox* had been on the several barges comprised in the agreement, but afterwards, and about the time when the valuation mentioned in the agreement was completed, *Mercer & Co.* caused their own names to be substituted for that of *Cox*. The numbers were also, at the same time, altered by their direction, and their names and the numbers so altered continued on the barges up to the time of their seizure, as hereinafter mentioned.

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The agent of the plaintiff, on the 27th of September, 1831, gave oral directions to a bailiff to distrain on the coal and culm on the wharfs, telling him that he was to receive instructions by putting a written paper into his hands, and at the same time telling him verbally that he was to seize for the plaintiff. The written paper was not produced on the trial.

Previously to September, 1831, *Mercer & Co.* had become indebted to the defendants for rates due to them for the conveyance of coal and culm, the produce of the said colliery, and other collieries upon the Swansea canal, under the provisions of the act of 34 *Geo. 3*, c. 109.

The said rates not having been paid, after due demand thereof, to the person duly appointed to receive the same at a time and place near to the canal, which had been duly appointed by the defendants for the payment of such rates,

12th September, 1831, the *barges in question*, (some of them being barges comprised in the mortgage then in the occupation of *Mercer & Co.* and lying in the defendants' canal laden with goods, in respect of which tolls were due and had been demanded,) were seized by the proper persons in that behalf, to compel payment of the said rates to the defendants, under colour of the said statute. Notice of such seizure was given by the defendants to *Mercer & Co.* The barges had been previously used in the carriage of coal and culm along the canal, in respect of which carriage part of the said rates had accrued to the defendants, but no part of the said rates was due in respect of the barges themselves.

15th September, 1831, the defendants caused *the coal and culm in question*, part thereof being the produce of the mines and veins comprised in the mortgage, and other part being the produce of other mines and veins, and then lying on the wharfs, also comprised in the indenture, and then in the occupation of *Mercer & Co.*, to be seized for the same purposes.

The defendants kept possession of the barges up to the 24th of September, on which day, (having caused them

to be appraised on the 19th,) they caused the same to be sold for the rates.

The defendants kept possession of the coal and culm, without removing the same from the place where they were lying when seized, until the 26th, on which day they caused the same (having first had them appraised on the 22d) to be sold for the further satisfaction of the said rates, which were not cleared by the proceeds of the sale of the barges, coals, and culm.

The coals and culm so seized on the wharfs had been carried upon and along the canal, and it was in respect of such carriage that part of the said rates, so unpaid as aforesaid, had accrued to the defendants.

20th September, 1831, *Mercer & Co.* committed an act of bankruptcy.

27th September, 1831, a commission duly issued, under which *Mercer & Co.* were adjudged bankrupts.

14th December, 1831, the assignees of *Mercer & Co.* commenced an action against the servants of the defendants to recover damages for the said seizure of the said barges, coal, and culm, which are the subject of the present action, and that action is still pending.

17th March, 1832, this action was commenced.

The questions reserved for the opinion of the Court are, First, whether the action was commenced in time within the 123d section of 34th *Geo. 3*, cap. 109: Secondly, whether the facts of the case establish a sufficient right of property in the plaintiff, as administrator, in the goods in question, at the time of the conveyance, to sustain the present action: Thirdly, whether the defendants were empowered by the 67th section to sell the barges, and to distrain the said coal and culm off the canal: Fourthly, whether it was competent for the *defendants* to insist, as a defence, that the barges, coals, and culm, which are the subject of this action, were before, and at the respective times of seizure, in the possession, order, and disposition of *Mercer & Co.* as reputed owners, within the 6th *Geo. 4*, cap. 16, sec. 72, and

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consequently, that the property therein was vested in the assignees and not in the plaintiff: Fifthly, if so, whether the circumstances stated established in law such reputed ownership.

If the opinion of the Court shall be in favour of the defendants on any of the above questions, a nonsuit is to be entered, otherwise the verdict to stand.

The act of 34 *Geo. 3*, c. 109, s. 124, (declared to be a *public act*,) under which the defendants were incorporated, gave them (sect. 67) certain rates for the tonnage and wharfage of coals, &c. conveyed upon the canal, to be paid to such person, at such place, at or near the canal, and under such regulations as the Company should appoint; and in case of denial or neglect of payment on demand, the Company were empowered to sue for them in any court of record, or the person to whom they ought to have been paid might *seize the goods* &c. in respect whereof any such rates ought to have been paid, or any part thereof, and the *boat* or vessel laden therewith, and detain the same until such payment should be made, and also until payment of all arrears of the said rates which might be due from the owner or owners of such boat or vessel to the Company, together with reasonable charges for such seizure and detention; and if such *goods* were not redeemed within seven days next after the taking thereof, they were to be appraised and *sold*, as in cases of distress for rent.

By section 86, every owner or master of any boat, &c. (not being a pleasure boat,) passing upon the canal, is required to cause his name and place of abode, and number of his boat, &c. to be entered with the clerk of the Company, and also to cause his name and number to be painted on the outside of every such boat &c. under a penalty.

By section 123, any action or suit against any person or persons, for any thing done in pursuance of that act, is required to be brought within six calendar months next after the *fact committed*; or in case there should be a continuation of damages, then within six calendar months next

after the doing or committing of such damage should have ceased.

Sir *J. Scarlett*, (with whom were *E. V. Williams*, and *R. C. Nichol*,) for the plaintiff.

I. The action was commenced in time. The seizure took place more than six months before the bringing of the action, but the property was not sold until within the six months. There was no such conversion as would maintain this action of trover, until the 24th and 26th of September, on which respective days the barges, and the coal and culm, were respectively sold. Where a man seizes the goods of another as his own property, the seizure itself is a conversion; but where he takes it under colour of a right, consistent with the right of the true owner, there is no conversion until after a demand and refusal, though a subsequent sale would be considered as an actual conversion, equivalent to that conversion of which a demand and refusal are evidence. Suppose a man by mistake to make a distress for rent not due, trover cannot be maintained until after a demand and refusal, because he does not seize the goods treating them as his own property. [Lord *Denmun*, C. J. Where a man seizes the property of another as his own, that is a conversion; but where he takes in such a manner as shows that he seizes under an impression that the seizure was authorized as a seizure of the goods of such other person, and not of himself, that is no conversion, unless there be a demand and refusal to restore the goods. The *selling* is certainly a *conversion*, but the *seizure* in this case, if wrongful, was an act of *trespass* committed more than six months before action brought. Can you vary the effect of the limitation by bringing your action in trover instead of trespass?] A party may waive a trespass and bring trover (*a*). If the case be not within

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First point:
Commence-
ment of action.

(*a*) Vide *Branscomb v. Bridges*, ante, vol. i. 321, 326. And see 1 Barn. & Cressw. 146, 2 Dowl. *Edmeads v. Newman*, 1 Barn. & Ryl. 256; *Hensworth v. Fowkes*, Cressw. 418, 2 Dowl. & Ryl. 563.

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Second point :
Property in
administrator.

the meaning of the former part of the limitation clause, it is within that part which applies to cases where there is a *continuation* of damage; for by the sale an additional injury was done to the plaintiff.

II. The plaintiff, as administrator, possessed at the time of the conversion a sufficient property to entitle him to maintain this action. The legal title to the minerals during the respective terms was in the intestate by virtue of the mortgage, and as soon therefore as the coals were raised, he or his representative was entitled to bring trover. It is no uncommon way of trying the right to coal mines, to bring trover for the coals raised (*a*). A landlord may bring trover for a tree cut down by his tenant (*b*). These coals were clearly the property of the plaintiff at the time of the conversion. The barges also were actually conveyed to the intestate as his absolute property. It is true that Cox was afterwards in possession of the barges and sold them to another, but this is not found to have been with the knowledge of the plaintiff.

Third point :
Sale of barges
and seizure of
coals off the
canal.

III. The defendants were not empowered by the 67th section of the act to *sell* the barges; or to *distrein* the coal and culm off the canal. That section provides, that in case of a refusal to pay rates, the Company may sue for them in any court of record, or a person to be authorized by them may seize the goods or other things in respect of which the rates were due, and the boat &c. laden therewith, and detain them until payment of all arrears of rates due from the owner of the boat &c. to the Company, and if *such goods* are not redeemed within seven days after the taking thereof, *the same* may be appraised and sold as in the case

(a) Vide *Rowe v. Grenfell*, 11 Co. Rep. 46, 52. And see *Ryan & Moody*, 396; *Rowe v. Berry v. Heard*, Cro. Car. 244; *Brenton*, 3 Mann. & Ryl. 133; Sir W. Jones, 255; *Palmer*, 387, S. C.; *Bewicke v. Whitfield*, 3 P. Wms. 267; Com. Dig. *Bicus*.

(b) *Herlakenden's case*, 4 Co. Rep. 62; *Richard Liford's case*, (II.)

of a distress for rent. It is clear that the *boats &c.* are not made liable to be *sold*. The Company are authorized to seize and detain the boats &c., in order that they may secure the goods, which they may sell if not redeemed. The Court will not say that the word "goods" in the latter part of the clause is used in a larger sense than before, so as to include boats and other vessels. The act must be construed strictly against the claim of tolls.

Neither can the Company seize goods after they have been landed out of the boats. They are empowered to seize the goods and the boats *laden therewith*. A distress for rent must be made upon the land demised. This seizure is intended to be in the nature of a distress, and must be made whilst the goods are on the canal.

IV. The defendants, who are wrong-doers, are not entitled to set up the *jus tertii*; and supposing them to be entitled so to do, there is nothing to shew that at the time of the bankruptcy the goods were in the order and disposition of *Mercer and Co.* as reputed owners *with the consent of the true owner*, so that the property in them would vest in the assignees. The assignees would have no better title as against the plaintiff than *Cox* had, for a man can make no transfer of property which he does not himself possess. This point turns entirely upon the bankrupt act, and resolves itself into a question, whether the goods were in the order and disposition of the bankrupts with the consent of the *true owner*. [*Patteson, J.* It seems to me to be a question of fact hardly raised by this case, whether up to the time of the seizure the goods were in the order and disposition of the bankrupts with the consent of the plaintiff as the true owner.] There is no evidence stated to show that the plaintiff knew that *Cox* had made this transfer to *Mercer and Co.* The facts stated in the case respecting the distress made on behalf of the plaintiff, were introduced with the view of shewing a recognition on the part of the plaintiff, but no such inference can be fairly drawn from those facts.

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Fourth and
fifth points :
Jus tertii.

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Whitcombe, *contra*. If the Court shall be of opinion with the defendants upon any one of the points raised, they will be entitled to judgment.

I. The action was not commenced in time. First, the *fact committed*, within the former part of the limitation clause, was the seizure and not the sale; and secondly, this is not a case of continuing damage within the meaning of the latter part of the clause.

First point.

1. The seizure, which is assumed to be legal, is the act contemplated by the clause of limitation. There are decisions upon very similar limitation clauses in acts for the protection of the revenue, which are strong to shew that the *seizure* is the act done from which the time of limitation runs, and that the question is the same whether the action be in trover or trespass; *Godin v. Ferris* (a) *Saunders v. Saunders* (b), *Crook v. M'Tavish* (c). The demand and refusal are not, as has been contended, the conversion. They are merely evidence of the tortious nature of the original taking. It has been urged by Sir J. Scarlett that a party may waive trespass and bring trover or case. This is undoubtedly true; but it does not follow that a party can waive a series of trespasses,—not for the purpose of cutting down the nature of the complaint, but for the purpose of avoiding the operation of a limitation clause. Suppose that the act had authorized the Company to seize and detain, but had not gone on to give them the power to sell; and the Company, having taken goods, had used them as their own year after year, could the owner, at last discovering that the original seizure was wrongful, have then brought an action of trover, and have said that the last act of user was in law a conversion, and that therefore he is within the period of limitation? The clause giving the power of sale cannot vary the case. This case may be illustrated by the statute of 21 Jac. 1. On that act, could

(a) 2 H. Bla. 14.

(b) 2 East, 254.

(c) 1 Bingham. 167.

it be contended that if a horse had been tortiously taken at a time beyond the term of limitation, an action of trover might be brought to recover it, if it could be shewn that the taker had ridden and driven it *within* the time of limitation? [*Taunton, J.* In those cases you suppose the subsequent act to be of the same nature as the original act. Put this case—A party has a right to seize goods and detain them by way of pledge, and he retains them and sells them at the end of eleven months, he having no power to sell until the end of twelve months, would this sale have reference to the original seizure?] Certainly not. Then the sale would be the first tortious act. [*Taunton, J.* Then I put any case in which the second act is an aggravation of the first act.] If the first act is a conversion, the whole damage is then done. If the subsequent act augments the injury the party may perhaps treat that as a fresh tort, although there is a case which makes even that doubtful, which is the case of an action for words actionable *per se*, but which have also been followed by special damage. In such a case, it is held that the action must be brought within two years, the limitation for words actionable *per se* being two years, and that for words actionable only, when followed by special damage, being six years. *Wordsworth v. Harley (a)*. [*Patteson, J.* In that case the alleged wrongful inclosure of the plaintiff's ground was previous to the three months, and therefore the injury complained of was then complete. The ground was not more completely separated, by raising the walls higher within the three months preceding the action.]

2. This is not a case in which there has been a continuation of damages. Such continuation can only be said to exist in those cases where the damage is not complete, so that the amount of it would be ascertainable when the act is first done.

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Second point.

II. Assuming that the action was brought in time, and that the taking was wrongful, the plaintiff was not in a situation to maintain *trover* against the defendants. He could not have brought *trover* against *Mercer & Co.* without previously determining the implied licence to use the barges and to work the mines, which he had given them by standing by without objecting. He is the mortgagee, and they the under-lessees of the mortgagor, whom he allows to remain in possession. It is apprehended that he could not recover as against them, and consequently not as against the defendants. It is submitted that he could not have maintained *trover* against *Cox*, whom he allows to deal with his property as he pleases, without having made a demand. He must be considered as having stood by when the goods were sold, and therefore he cannot now come forward to invalidate the grant.

Third point.

III. The next question is as to the right of the Company to sell the barges; or to seize the coals and culm off the canal. The act contains no words limiting the right of seizure to the local limits of the canal. There is no authority for saying, as Sir *J. Scarlett* has contended, that in all cases of tonnage rates the Court will take it to have been intended by the legislature to confine the right to distrein for them within the local limits. If the Company had appointed the end of a wharf as the place where the tolls should be payable, would they not be able to take goods on the wharf? [Lord *Denman*, C. J. It is certainly more convenient that the rights of seizure should be confined to goods continuing in the barges; and the words authorizing the seizure of the boats "laden therewith," shew that the legislature did not contemplate a seizure of goods not in the boats.] The effect of this clause is, to limit the power of taking the boats to those cases in which the Company think proper to seize whilst the goods remain on the canal. Then, with respect to the barges: If they may be seized and detained, why may they not be sold? The power is to sell all the goods not redeemed. The word "goods" is large enough

to include the barges. The barges having been lawfully detained, must be considered as *goods* which are to be the subject of redemption. [Lord *Denman*, C. J. There is a very good reason for allowing the sale of the goods and not of the boats. The goods are sure to be sufficient to pay for the tolls, and the selling of the boats might ruin the owner.] The goods would be sufficient to satisfy the tolls due in respect of those goods, but they may not be sufficient for the arrears, as appears to have been the case in this instance. [Lord *Denman*, C. J. They have it in their own power always to prevent such arrears. This is a great and summary power, and we ought not to allow it to the Company except in cases in which they clearly bring themselves within the words of the act.]

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IV. The next point is as to the right of the defendants to set up *jus tertii*, assuming the bankrupts to have been the reputed owners. No case has been met with in which others than assignees have been allowed to set up the reputed ownership, but that may be owing to the case having but rarely occurred. If the defendants cannot do so, the consequence will be that they will be obliged to pay the value of the goods to the plaintiff; and in the action now pending between the assignees and the defendants, they will be obliged to pay the amount over again. Fourth point.

V. The goods were in the order and disposition of the bankrupts. The facts are abundant to shew that all the world might have given them credit as being the true owners. The true owner, by enabling *Cox* so to deal with them that he could invest the bankrupts with the reputed ownership, has consented to the goods being in *their* order and disposition. [Taunton, J. They have not the consent of the *true owner*, but the consent of a party *dealing with the goods as the true owner*.] Fifth point.

Sir *J. Scarlett*, in reply. This case differs from the several cases cited in this, that the *sale* here constitutes the real injury to the plaintiff. Until the sale; there was no aspor-

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tation of which the plaintiff could complain. In the cases cited, the seizure was the substantial grievance. It is also observable that in those cases there was only a repetition of the same acts; whereas here is an act from which no damage arises to the plaintiff, followed by an act from which damage does arise. In such a case, it would be an unjust construction of the act, to say that the limitation shall run from an act which is innocent. [*Patteson, J.* The wrongfulness of the sale depends upon the wrongfulness of the seizure. Must not the sale therefore have reference back?] The seizure was no act of trespass *as against the plaintiff*, until the removal. If a party lets a house and goods, and another seizes, and does not sell, the goods, the *lessor* cannot maintain trespass, because he had not the possession; but if they were *sold*, he could maintain trespass, because he had the right of possession. The damage done to the plaintiff was not in the seizure, but in the subsequent asportation.

Fifth point.

With regard to the question, whether the goods were in the order and disposition of the bankrupts with the consent of the true owner; it is going very far to say that it is sufficient if the bankrupt have the goods, with the consent of a party who has the consent of the true owner to his own possession. The bankrupt *himself* must have the consent of the true owner. There is nothing here from which the consent of the true owner can be inferred. On the contrary, it is very improbable that the plaintiff would have consented to the sale by the mortgagor to *Mercer & Co.* [*Patteson, J.* The onus of proving the consent lies on the *defendants*. The case does not state it as an actual fact, nor does it state any facts from which it can be inferred.] The assignees themselves therefore could maintain no title to the goods, even supposing that, under the circumstances of the case, the bankrupts could be considered as *having the possession* at the time of their bankruptcy; which may well be doubted, as the seizure by the defendants was previous to the act of bankruptcy.

Lord DENMAN, C. J.—We are agreed upon all the points except that as to the limitation, which we will look into. We think that all the other points are clearly with the plaintiff.

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On a subsequent day in this term, Lord DENMAN, C. J., delivered the judgment of the Court as follows:—

In this case the Court having in the course of the argument decided two points in the plaintiff's favour, viz. that he had sufficient property and right of possession to entitle him to maintain the action, and that the defendants had no right to convert his goods, wished for an opportunity of considering whether the first objection was well founded. First point. It arose upon the 123d clause of the Canal Company's act, under which every action brought against them for any thing done by them is to be commenced *within six calendar months next after the fact committed*, or in case there shall be a continuation of damages, then within six calendar months next after the doing or committing such damage shall have ceased. The plaintiff here brought trover for certain goods and boats, which had been mortgaged to his intestate, and which were by the mortgagor leased to certain persons residing near the canal. These goods had been unlawfully seized as a distress for tolls claimed to be due from the person in possession, by the defendants, more than six months before action, but had afterwards been sold within the six months. The defendants argued that the *seizure* by them was *the fact committed*, whence the action was brought too late; but the plaintiff claimed the right to treat the *act of sale* as the fact committed; and we are of opinion he may do so. If this action had been brought by the mortgagor's lessee, being in possession of the property, the cases of *Godin v. Ferris* (a) and *Crook v. M'Tavish* (b) are strong to shew that it must have been within the limited period after the first unlawful seizure; and the Court might

(a) 2 H. Bla. 14.

(b) 1 Bingh. 167; 8 B. Moore, 263.

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have found it difficult to say that his resorting to an action of trover instead of bringing an action of trespass could have *extended* his rights. But the *plaintiff* suffered no injury from the trespass committed on his goods while they were in the possession of another. The damage that was first done to *him* arose from the sale; by which the goods were placed beyond his reach, and converted to the use of the defendants, at a time when the *plaintiff* was entitled to the possession of them. We therefore think the plaintiff has brought his action within six months of the *fact committed*.

Judgment for the plaintiff.

MOORE and another v. TAYLOR.

Upon an insurance from England to Barbadoes, and *all or any* of the West India colonies, to continue until the ship shall be arrived *at her final port of discharge*, the risk terminates on the discharge of the outward cargo at any of the colonies.

The cargo having been landed at Barbadoes, with the exception of coals and bricks brought from England, serving as bal-

last, (though of greater weight than was requisite for that purpose,) but used in the West Indies also as merchandize, the ship is lost in Barbadoes while about to proceed to another colony with the bricks and coals, and with other articles loaded there. It is a question for the jury to decide, whether, notwithstanding the coals and bricks remaining on board, the outward *cargo* had not been substantially discharged before the loss occurred.

ASSUMPSIT on a policy of assurance upon the hull and materials of the Decagon, at and from St. Vincent, Barbadoes, or all or any of the West India colonies (Jamaica and St. Domingo excepted), to her port or ports of discharge, and loading in the United Kingdom, during her stay there, and thence back to Barbadoes and all or any of the West India colonies (Jamaica and St. Domingo excepted); beginning the adventure upon the said ship, &c. at St. Vincent, or wheresoever loaded, to continue until the ship, with all her tackle &c., and goods and merchandize whatsoever, should be arrived *at her final port as aforesaid*, with liberty to proceed and sail to, and touch and stay at, any ports and places whatsoever, and to load or unload goods at all places she might call at. The declaration alleged a total loss by perils of the seas. At the trial before *Denman, C. J.*, at the sittings at Guildhall, after last Hilary term, the following facts appeared:—

10th May, 1831. The Decagon, a brig of 200 tons burthen, being laden at Barbadoes, sailed thence for Liverpool.

June 1831, the Decagon arrived at Liverpool.

In pursuance of an order sent by the plaintiffs (who are merchants in Barbadoes) to their correspondents at Liverpool, the latter, as soon as the cargo of the Decagon was discharged, loaded her with a return cargo, which was invoiced at about 730*l*. This cargo, so ordered and put on board, consisted in part of 39 tons of coals in bulk, and 15,000 bricks, which would be equal to 20 or 30 tons more; which coals and bricks were invoiced at 19*l*. 10*s*. and 25*l*. 10*s*.

1st July, 1831, the Decagon sailed from Liverpool with her cargo on board, and on 2d August she arrived at Barbadoes, where the cargo was entered inwards in the usual way.

31st July, 1831. Previously to the arrival of the Decagon at Barbadoes the plaintiffs wrote a letter to their correspondent at Berbice, stating that they had determined (and, in fact, they had determined) on sending the Decagon over to Berbice "with as many molasses-puncheons as she could carry, besides the coals and bricks *that she ballasted with,*" and requested the correspondent to procure a cargo of molasses for the English market. They also wrote to their correspondent at Demerara, requesting him to procure a cargo of molasses for the Decagon, in case the correspondent at Berbice should write to say that he could not procure the article upon the terms prescribed to him. Previously to the 10th of August the whole of the cargo shipped on board the Decagon at Liverpool was discharged, except the coals and bricks. The coals and bricks were loose at the bottom of the vessel, and she could not safely have proceeded to Demerara or Berbice, without the coals and bricks, or something which might serve as ballast on board; but coals and bricks sent from England in return ships are regular articles of merchandize in the various West India islands. The plaintiffs, without thereby causing any delay, put on board the Decagon in Barbadoes 330 empty molasses casks, being about as many as, when filled,

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the vessel could carry. If the vessel had arrived safely at Demerara or Berbice, she would at one or other of them, according to circumstances, have discharged and sold the coals and bricks, and have loaded a cargo of molasses for the United Kingdom, if molasses could have been obtained, and in such case the casks would have been filled with molasses. On the 10th August the casks were all on board, and on that day the plaintiffs made out the shipping documents for the coals, bricks, and empty casks, it being intended to have formally completed them on the following day. On the same day the *Decagon* was advertised in the public books of the arrivals and departures of vessels, to sail on the following day. On the same night, or in the morning of the 11th August, the vessel was totally lost in a hurricane. The plaintiffs contended that the vessel was protected at the time of the loss, for that she had not yet arrived at her *final port*, according to the terms of the policy; that by the words "final port" was meant the last port in geographical order at which the vessel might touch, without reference to the state of her cargo. For the defendant it was contended, that by "final port" was intended "final port of discharge," and that, therefore, the only question was, whether the cargo was substantially discharged at Barbadoes: and the case of *Inglis v. Vaux* (a) was relied on for the defence. The Lord Chief Justice directed the jury to find for the defendant, in case they thought that the cargo had been substantially discharged at Barbadoes; otherwise for the plaintiffs. The jury found for the defendant, and stated that they thought the cargo had been substantially discharged at Barbadoes.

Sir *J. Scarlett* now moved for a new trial. The plaintiffs are entitled to a new trial on one of these two grounds either there was a misdirection by the learned judge; or if the direction was right, the verdict was against the evidence.

(a) 3 Campb. 437.

I. In the direction to the jury, the policy was treated as covering the ship only until she arrived at her port of *discharge*. It is submitted, however, that this is not the correct construction of the instrument, but that the vessel might go, as a seeking ship, from island to island, in geographical order, until she arrived at the last port, or at some port where she obtained a homeward cargo. *Inglis v. Vaux* (a) is not a parallel case, because there the vessel, at the time of the loss, was actually staying in a port, as well for the purpose of procuring a homeward cargo, as for that of disposing of the remnant of the outward cargo.

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First point :
Misdirection.

II. The evidence does not support the finding, that Barbadoes was the final port of discharge, supposing that to be the proper question. The coals and bricks, the weight of which was far more than was requisite for ballast, constituted a part of the cargo, and were not properly considered as ballast. Until these articles were discharged, therefore, the risk continued.

Second point :
Verdict
against evi-
dence.

LITLEDALE, C. J.—I think, that if I had been on the jury, I should have come to a different conclusion. I should have thought that the coals and bricks were too large a part of the cargo to be properly considered as *ballast*. I have no doubt but that they were taken as *ballast*, but I should think that they were also taken as *merchandise*. It was a question for the jury, whether the vessel had substantially discharged her cargo, and though I should have thought differently from them, yet I do not see that they are so wrong that we ought to interfere.

Second point.

With respect to the question upon the words of the policy, the object of the policy was, I think, to cover the ship whilst carrying merchandise to England and during her return to the West Indies with a cargo, until she had substantially performed her voyage. That, I think, is the meaning of the words, and that when the vessel had dis-

First point .

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charged her merchandize the risk was at an end. I do not agree with what Sir *J. Scarlett* says, that the policy attaches upon the ship after she leaves her port of discharge and becomes a *seeking* ship.


First point.

PARKE, J.—I am of the same opinion upon the construction of the policy. It is contended that the ship was protected, not only in going and returning to and from England, but also whilst she was seeking in the West Indies for a fresh cargo with which to *return* to England. This is too large a construction. I think she was only protected in going to England and back again to her final port, which, I think, means Barbadoes or any other port in the West Indies at which she discharged her cargo. The words “final port as aforesaid,” in the latter part of the policy, are explained by reference to the former part of that instrument. The construction which we put upon this is the same as was put upon the policy in *Inglis v. Vaux*, which I think not distinguishable. Then the question for the jury, which was left to them, (and, as I think, properly left,) was, whether they thought that the discharge which took place at Barbadoes was a discharge of the whole cargo;—whether, in fact, that which remained on board was intended to be dealt with as merchandize or as ballast? As the ship was a seeking ship, some ballast was necessary; and if this was intended as ballast, the merchandize must be considered as having been discharged, and the risk of the underwriters was at an end. This was a question for the jury.

Second point.

I am not to say whether I should have come to the same conclusion. Certainly the quantity was very large to be treated as ballast merely, and perhaps I should have differed, but still it was for the jury to say whether it was intended for ballast. The plaintiffs, in their letter of 30th of July, treat the coals and bricks as ballast. Under all the circumstances it was for the jury to decide; and it is impossible for us to say that they have done wrong.

PATTESON, J.—I think the words “at her final port as aforesaid” must mean “at her final port of *discharge*.” Therefore it came to be a question for the jury. Have they come to so wrong a conclusion that we must interfere? I do not see that they have come to a wrong conclusion at all. They are the best judges. It is true that there were strong circumstances against their finding; but then, on the other hand, there is the letter of the parties to be set against those circumstances.

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Rule refused.

The KING v. The Churchwardens of CLERKENWELL.

FRENCH obtained a rule calling upon the churchwardens of the parish of St. James, Clerkenwell, to shew cause why a mandamus should not issue, commanding them to set aside a certain election of guardians of the poor of the said parish, and commanding them to hold a vestry for the purpose of electing four persons to be such guardians, and to proceed in such election under the provisions of the local act of 15 *Geo. 3*, instead of those of 58 *Geo. 3*. c. 69.

By a local act, 15 *Geo. 3*, c. xxiii, certain individuals were appointed the guardians or governors of the poor, within the parish of St. James, Clerkenwell, and the inhabitants of the parish (paying to the rates for church and poor) were authorized, in case of the death, refusal to act, or removing out of the parish, of any of the guardians, to assemble in the vestry-room on Tuesday in Easter week, or within one month after, to elect and appoint other persons to be guardians or governors, in the room of such persons dying, refusing to act, or removing out of the parish.

By the 8th section of 58 *Geo. 3*, c. 69, “for the regulation of parish vestries,” it was provided that nothing in that

By a local act the inhabitants of the parish of Clerkenwell paying church and poor rates were empowered to elect guardians of the poor. In the vestry act (58 *Geo. 3*, c. 69,) which regulates the mode of voting in vestries, is a proviso that that act shall not affect the right or manner of voting in any vestry held by ancient usage or by a special act. Held, that this proviso did not except the parish of C. from the operation of 58 *Geo. 3*, c. 69,

and that to bring a vestry within the exception it must have a peculiar constitution.

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act contained, should extend to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any township or place, by virtue of any *special act* or acts, or of any ancient and special usage or custom, or to change or affect the right or manner of voting in any vestry or meeting so holden.

Four vacancies having occurred, a public vestry was held on the 1st of May for the purpose of electing four new guardians of the poor. Several candidates were then proposed, and the meeting was adjourned for the more convenient taking of the poll. The votes were, at the adjourned meeting, received according to the mode prescribed by the third section of 58 Geo. 3, c. 69. (a)

Campbell, A. G. and Bodkin, now shewed cause. Two answers may be given to this application.

First point:
 Mandamus
 not proper
 remedy.

I. The election has taken place, and therefore the proper course to displace the persons filling the office, is to apply to this Court, not for a mandamus, but for an information in the nature of a quo warranto.

Second point:
 Proviso in 58
 Geo. 3, c. 69,
 applicable to
select vestries
 only.

II. The election is in conformity with the provisions of 58 Geo. 3, c. 69, and this vestry is not within the proviso of the eighth section of that statute. A vestry to be within the meaning of the eighth section, must be a *limited vestry*, existing by immemorial usage or by statute;—in popular language, a *select vestry*.

Sir James Scarlett and Erle, in support of the rule.

First point.

I. A mandamus is the proper remedy, for a quo warranto could not be granted in such a case as this. The only case which appears to the contrary is *Rex v. The Trustees of Whitehaven Harbour*. [*Denman, C. J.* The Trustees of Whitehaven Harbour are, in some sort, commissioners.]

(a) Which gives to each inhabitant rated for less than 50*l.* one vote, and to every inhabitant rated for more than 50*l.* one vote in respect of each 25*l.*, to the ex-

tent of six votes; and to persons jointly rated, a right to vote according to the proportion borne by each.

II. This is a vestry within the exception made by the eighth section of 58 *Geo. 3*, c. 69. The vestry is held under the local act and for the purposes of that act.

Lord DENMAN, C. J.—It is not necessary to decide whether a mandamus or an information in the nature of a quo warranto is the proper remedy in this case. The first question is, whether the meeting was protected by the eighth section of the 58 *Geo. 3*, c. 69. We do not find in the local act any thing which creates a peculiar constitution or power, such as it was the object of this eighth section protect.

LITLEDALE, J., PATTESON, J., and WILLIAMS, J., concurred.

Rule discharged with costs.

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Second point :

REX v. The Archdeacon of CHESTER.

F. POLLOCK had obtained a rule nisi calling upon the Rev. *Unwin Clarke*, archdeacon of Chester, to shew cause why a mandamus should not issue, commanding him to swear in certain persons as churchwardens of Manchester. The grounds stated in the rule were, that the applicants were duly elected, that a certain adjournment of the meeting for the election of the churchwardens was irregular and illegal, and that a poll taken on the day following was not duly taken.

The facts as stated upon the affidavits appeared to be these:—It had been the general usage of the parish of Manchester, without any special notice, to meet annually at the collegiate and parish church, in Manchester, on Easter chairman may, upon a poll being demanded, adjourn the meeting to the Town Hall, although a majority of the voters present object to such adjournment.

The right of adjourning the *business in progress* at a meeting, is vested in the persons assembled, and not in the chairman.

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Tuesday, for the election of churchwardens &c.; and it was customary also for the retiring churchwardens, &c., to produce at such meeting a list of persons whom they recommended as their successors. Shortly before Easter, in 1833, the then churchwardens &c., anticipating that other persons than those recommended by themselves would be put in nomination, gave notice that a meeting of the inhabitants would be held in the parish church on Tuesday the 9th of April then next, at 11 o'clock a. m., for the appointment of churchwardens &c. for the year ensuing, and that if a poll were demanded, the meeting would be immediately adjourned to the Town Hall in Manchester; the poll to be kept open till four o'clock p. m. of that day, and to be continued from day to day at the Town Hall from ten a. m. until four p. m. of each day up to the 16th April. A meeting was on the 9th April held at the parish church in pursuance of such notice, and on that occasion the senior churchwarden read a list of persons whom the retiring churchwardens &c. recommended as their successors, and moved that such list should be adopted by the meeting. Other lists were presented by other parties, and amongst these a list containing the names of the persons now claiming to be sworn in. This latter list was carried by a large majority of the ratepayers present. A poll being demanded, the senior churchwarden, as chairman, refused to permit the poll to be taken in the church, and adjourned the meeting for that purpose to the Town Hall, according to the notice. The majority of persons present refused to assent to the adjournment, but, nevertheless, the poll proceeded at the Town Hall, and terminated in favour of the list presented by the churchwardens. The archdeacon, whose duty it is to swear in the churchwardens &c., administered the oath to the persons who obtained the majority upon the poll at the Town Hall, and refused to swear in the present applicants.

Sir *J. Scarlett* and *Starkie*, now shewed cause. The churchwardens, supposing that great multitudes would at-

l, gave notice that if a poll were demanded the meeting
ld be held in the Town Hall. [Lord *Denman*, C.J. The
ce appears to us to be very proper, unless there is an
ority to the contrary. There is a case in *Strange's Re-*
s(a), which decides that the meeting cannot be adjourned
he chairman without the consent of the meeting; but
case does not appear applicable to the particular cir-
stances of this case.]

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s(b) shews that if a meeting is called, the right of
urnment is not in the chairman. If then the chairman
no right to adjourn the meeting, he cannot, giving
ce of an intention to do so in case a poll should be
anded, make that legal which would otherwise be illegal.
rd *Denman*, C. J. The churchwardens appoint two
rent meetings for two distinct purposes.] They had no
t to appoint two meetings. If the previous notice by the
chwardens could make the adjournment legal, it would
been equally so if the chairman had given the notice
ie church previously to commencing the business. The
urnment was opposed by a large majority of the rate-
rs, and was made in defiance of their objection.

ord DENMAN, C. J.—The objection to the election,
ch is ingeniously put, does not apply. Those who
mon the meeting may lay down the proper order of
ling it. If the church is not a convenient or an appro-
te place for taking a poll, they may say at what other
e that part of the business shall be transacted. It is
insinuated that there has been any surprise, or that any
stice has been committed. If the case which has been
d from *Strange's Reports* applied, we should of course
in accordance with it, but I think that it does not apply.
at was there decided, is, that the chairman has no right
djourn the business in progress at the meeting, but that

(a) *Stoughton v. Reynolds*, 2 Str. 1045. (b) 2 *Strange*, 1045.

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the power of adjournment is in the meeting at large. Here neither the meeting for the show of hands nor that for the taking of the poll was adjourned by the chairman. The parties have done right, and this rule must therefore be discharged.

LITLEDALE, J.—I am of the same opinion. In the common course of things the person who calls a meeting has a right to say, that the meeting for the shew of hands shall be held at one place, but that if a poll be demanded, the meeting shall be adjourned at another place more convenient for the taking of the poll.

PATTESON, J.—The fallacy of Mr. *Pollock's* argument is palpable. An objection might have been successfully made if the churchwarden had said, if a poll is demanded I will exercise a discretionary power as to the adjournment of the meeting. Here the adjournment was part of the original notice.

WILLIAMS, J., concurred.

Rule discharged.

The KING v. The Trustees and Managers of the WITHAM
 SAVINGS' BANK.

When deposits are made in a savings' bank by a benefit society, of

whom a part have since been expelled by an order of magistrates who had no authority to interpose, the managers of the bank are not compellable, upon the application of the members so illegally expelled, to appoint an arbitrator to settle disputes as between such managers and the depositors.

Nor, in any case, where deposits have been made on behalf of a society, are the managers compellable to appoint an arbitrator upon the application of individual members, not being the representatives of the whole or of a majority of such society.

Magistrates have no authority, under 49 *Geo.* 3, c. 125, to make orders enforcing rules of a benefit society which have not been duly enrolled.

certain disputes alleged to have arisen between them and the applicants, had been obtained upon affidavits, from which the facts appeared to be as follows :

Deposits had been made in the Witham Savings' Bank by the steward and officers of "The Sons of Economy" benefit society, in the name of the society. This society had been established in 1804, and its rules inrolled. Afterwards, by a resolution of the society, new rules (not inrolled) were adopted and acted upon for several years, at the end of which it was resolved to return to the original rules, and these have not since been inrolled. The 16th regulation of the original society rendered a party who attempted to break up the society liable to fine and exclusion. A majority of the members (including the present applicants, who were at the time stewards and officers of the society,) subsequently to making the deposits above mentioned, agreed to certain resolutions respecting the distribution of a sum of money then in hand; and this being viewed by some of the members as an attempt to dissolve the society, the members who were parties to the resolution were in consequence expelled from the society by an order of magistrates, purporting to be founded upon 45 *Geo. 3*, c. 125. The applicants denied the authority of the magistrates to expel them, the rules not having been inrolled, and claimed to have the deposits, or such portion as they had contributed, returned to them by the savings' bank. The managers of the bank refused to do this, or to refer the matter to arbitrators, under 9 *Geo. 4*, c. 92, s. 45.

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R. V. Richards now shewed cause. The Court have no power to issue a mandamus in this case. The 45th section of 9 *Geo. 4*, c. 92, directs the trustees or managers of the savings' bank to appoint an arbitrator, in case any dispute shall arise between any such institution and any individual depositor therein, or any person being or claiming to be executor, administrator, next of kin, or creditor of any deceased depositor. This is not one of the cases contem-

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plated by that enactment. Here, the question which it would be necessary to decide, in order to be able to determine whether the applicants were entitled to claim the deposits, is, whether they were lawfully expelled. The arbitrators have no power to inquire into and settle the disputes of the benefit society, or to decide whether the magistrates were authorized in expelling the applicants. By section 5 of 49 Geo. 3, c. 125, orders of magistrates made under that act are rendered conclusive, and after the magistrates have excluded any parties, the Court will not treat them as depositors. The money was paid in as the money of the whole society, and cannot now be claimed by any parties who do not distinctly appear to constitute that society, or to be its representatives. In *Rex v. The Cheadle Savings' Bank* (a), which was decided in the last

(a) *REX v. The Trustees and Managers of the CHEADLE SAVINGS' BANK.*

By the rules of a savings' bank, deposited with the clerk of the peace, pursuant to 57 Geo. 3, c. 130, s. 2, entries of deposits are to be made in a book kept by the bank for that purpose, and in a duplicate account book to be kept by the party making the deposit, which duplicate is to be a voucher for the party producing it, and a receipt for the bank when handed over to them.

A. deposited in the name of B., and afterwards,

without B.'s authority, received back the amount and delivered up the duplicate account book:—Held that B. still continued to be a depositor.

A party is not entitled to a mandamus to compel a savings' bank to refer to arbitration under 9 Geo. 4, c. 92, s. 45, unless he shew himself to the Court to be at the time a depositor.

JENKINS had by the hands of *Labdon*, regularly during several years, previously to June, 1826, made weekly deposits in the Cheadle Savings' Bank, in the names of the children of *Christopher Whitworth*. The rules of this bank were entered in a book, of which a copy was deposited with the clerk of the peace, and filed pursuant to 57 Geo. 3, c. 130, s. 2. By one of these rules all deposits were to be entered in a book kept for the purpose, of which the depositor was to have a duplicate. By another rule this duplicate was to be a voucher for the depositor and a receipt for the bank when delivered to them. In June, 1826, *Labdon*, by the desire of *Jenkins*, withdrew the whole amount of the deposits, and delivered the duplicate account books to the bank. *Jenkins* subsequently made his will, by which he left a considerable property to *Whitworth* and his children, and died. After his death, *Whitworth* applied to the savings' bank on behalf of his children, to receive the money which had been deposited in their names, and which he did know to have been withdrawn. The managers of the bank having refused to pay him the amount, or to appoint an arbitrator under 9 Geo. 4, c. 92, s. 45, a rule nisi for a mandamus to compel them to do the one or the other was obtained.

R. V. Richards shewed cause, and contended, that under sect. 4 of 57 Geo. 3, c. 130, which was in force at the time of making the deposits,

without B.'s authority, received back the amount and delivered up the duplicate account book:—Held that B. still continued to be a depositor.

A party is not entitled to a mandamus to compel a savings' bank to refer to arbitration under 9 Geo. 4, c. 92, s. 45, unless he shew himself to the Court to be at the time a depositor.

term, the Court issued a mandamus to the directors of that bank to appoint an arbitrator to settle the disputes which had arisen between them and the applicants; but that was on the ground, as observed by *Patteson, J.*, that upon the whole *they* were to be considered as the depositors. These parties cannot be considered as such.

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Knowles, contra. This is a plain case, and comes exactly within the meaning of the act. It is quite clear that no action will lie against the directors of a savings' bank, for the recovery of deposits, *Crisp v. Bunbury (a)*, and there-

parties depositing were bound by the rules of the savings' bank, and that infants being empowered to deposit by sect. 5, were bound by the rules equally with adults; that therefore these children were bound by the rules respecting the depositors' duplicates, which, he contended, authorized the bank in paying over the deposits to *Labdon*, upon his producing the duplicates.

F. Kelly, contra, contended, that the children having been treated as the depositors, the trustees could not be authorized in paying over the deposit to *any one* who should apply with the books, and that the circumstance of the money having been paid in by the hands of *Labdon*, and having been originally the property of *Jenkins*, and not of the children, did not affect the right of the children to claim the deposits, or at all events to have that claim referred to arbitrators; that the object of the arbitration clause in 9 Geo. 4, c. 92, was to prevent the expense of litigation in a very wide class of cases; that in terms, upon principle, and according to the decision of the Court, in *Crisp v. Bunbury*, (8 Bingh. 394, 1 Moore & Scott, 646,) the arbitration clause applied to disputes arising in respect of deposits made before July, 1828, when the 9th Geo. 4 came into operation as well as in respect of deposits made since that time. [*Patteson, J.* In that case the party continued a depositor until after the act of 9 Geo. 4. Before the applicant can have a locus standi in the Court, he must shew that he is a depositor, for the question whether a party is a depositor, ought not to be referred to the arbitrator.] It is not contended that such question ought to be referred, but it is submitted that here the children continued depositors, notwithstanding the wrongful act of *Labdon*.

DENMAN, C. J.—Upon all the circumstances, the Court are of opinion that it is fit that this case should go to arbitration.

Rule absolute.

(a) 8 Bingh. 394; 1 Moore & Scott, 646.

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fore there is no remedy except by compelling the appointment of arbitrators. It is said that the applicants have been expelled from the society; but this is supposed to have been done by an order of magistrates, who had no authority to do so, as the rules of the society were not inrolled; *Rex v. Gilkes (a)*. The enactment respecting the appointment of arbitrators extends to individuals as well as to societies. The society of "The Sons of Œconomy" are depositors within the act, although their rules are not inrolled so as to constitute them a *friendly society*. This application is made on behalf of persons who claim to be the rightful stewards and officers of the society, rather than those who are nominally so. *Rex v. Cheadle Savings' Bank*, which has been already mentioned, is very similar to this case. There was in that case much question whether *Whitworth* had any claim or not, and yet the Court granted a mandamus for the appointment of arbitrators. The question which the arbitrators would have to determine in that case, was similar to that which arises here, namely, whether the applicant was the party entitled to receive back the deposits. [*Littledale, J.* Were the stewards who paid the money in the same that now apply?] It is not so stated.

LORD DENMAN, C. J.—As I understand the facts, the case stands thus: There is a benefit club, bearing the name of "The Sons of Œconomy," which in its corporate capacity pays in certain deposits to the Witham Savings' Bank. Afterwards the society splits into factions, and the officers (who now claim) are expelled, perhaps by illegal process. Under these circumstances they claim to be the officers of the society, and in that capacity they require a return of the deposits. The bank say "no; we did not receive these deposits from *A.* and *B.* individually, but from the club. We therefore will not pay except to officers

(a) 2 Mann. & Ryl. 454; 8 Barn. & Cressw. 439.

whom we know to be the officers." They may reasonably require that the parties shall appear legally to be the *representatives* of the society. That not having been shewn, I think that the rule must be discharged.

LITLEDALE, J.—I also think that the rule must be discharged. Who are the depositors? It appears that the deposits were made in the names of the stewards of "The Sons of Œconomy." By the act, if any dispute arises between *depositors* and the savings' bank, the *depositors* may require to have the matter referred to arbitrators. If the applicants represent the club, they are entitled to have an arbitrator appointed. Mr. *Richards* contends that they do not represent the club, because they have been expelled under 49 *Geo. 3*, c. 125. That is answered by saying that the rules were not inrolled, and that therefore the magistrates had no power to expel. I am satisfied that the magistrates have no power to act where the rules are not inrolled; and therefore I consider the stewards as still remaining members of the society of "The Sons of Œconomy." Mr. *Knowles* contends, that if a number of persons, not calling themselves a friendly society, deposit, they may apply for an arbitrator, in case of any dispute. I agree that they may; but the question must be, do the applicants in this case represent those persons? The bank ought to be satisfied that parties who apply do so on behalf of the depositors. The party should be the agent, not necessarily of all, but of the majority. If an action be brought, all the parties claiming must join. So here, it must appear that the persons applying have the authority of the whole, or at least of such a majority as may constitute them fair representatives of the general body. I asked whether the stewards now claiming were the stewards at the time of making the deposits. It does not appear that they were; and the deposits were made not in the name of *A.* and *B.* &c. but in the name of the whole company.

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PATTESON, J.—I think this a clear case. Here is a bank regularly constituted, and a deposit is made in it on behalf of a society calling itself "The Sons of Economy." Then the question arises, whether we are to call upon the bank to appoint arbitrators to try *who* now constitute that society? I do not think that we have power to do so. The members of the society have disputed among themselves. Let them agree *amongst themselves*, and they will then have no difficulty in obtaining payment from the bank.

WILLIAMS, J.—I entirely agree with the rest of the Court. It appears that the money was paid in by a certain clerk, on behalf of a certain society, and before we issue a mandamus to compel the appointment of an arbitrator, we must of course see that the party applying has a right to represent that society. They have no right to apply as individuals.

Rule discharged, with costs.

PLIMMER v. SELLS.

It is competent to a jury to infer agency in a wife, to accept a notice with respect to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-house, appearing to conduct his business with reference to the transaction in question, and on one of these occasions giving directions to the foreman.

CASE for negligence against the bailee of a gig, with a count in trover. At the trial before Lord *Denman*, C. J., at the London sittings after Easter term, 1832, evidence to the following effect was given:—

One *Whelpdale*, the builder of the gig, had sent it by a labourer to the care of the defendant, who was a livery stable-keeper; and whilst it was standing on the defendant's premises, had sold it to the plaintiff for 35*l*. After the sale, *Whelpdale* went to the defendant's premises for the purpose of directing a transfer of the gig, in pursuance of the sale. The defendant was from home, but his wife was

with reference to the transaction in question, and on one of these occasions giving directions to the foreman.

in his counting-house, and upon being applied to by *Whelpdale*, ordered the gig to be brought out, which was accordingly done by the defendant's foreman, who was in the yard. *Whelpdale* then directed Mrs. *Sells* to transfer the gig from his name into that of the plaintiff's, and Mrs. *Sells* then wrote something in the counting-house. It was then agreed between Mrs. *Sells* and the plaintiff that 2s. 6d. a week should be charged for the standing of the gig. Immediately before the action was commenced, the clerk to the plaintiff's attorney and the plaintiff went to demand the gig, and found Mrs. *Sells* in the counting-house, writing in the books of account, her husband being from home. The clerk told her that he was come for the gig, and he described it as a gig left there by *Whelpdale*. Mrs. *Sells* said she well remembered it; and upon being asked to refer to the books of account, she did so. No entry of the transfer being found, she said she must have written the transfer on a piece of paper. She stated that the gig had been fetched away by the man who had brought it, and this was confirmed by one of the men in the yard whom she called for the purpose. There was no evidence of the wife's acting for her husband in any other instance. The defendant not being able to deliver the gig to the plaintiff, the present action was brought. It was objected that what Mrs. *Sells* said or did was not evidence against the defendant, so as to charge him with notice of the transfer, without other proof that she was his agent; but the Lord Chief Justice received the evidence, and told the jury that he thought that the circumstances shewed that the wife was acting for her husband, and that if they were satisfied that such was the fact, they ought to find for the plaintiff. The jury found a verdict for the plaintiff, damages 35*l*. In the following Trinity term, *Campbell*, S.G., pursuant to leave given at the trial, moved for a rule nisi for a nonsuit, or a new trial, which was granted.

Platt shewed cause, and contended that the circum-

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stances of the wife's being in the defendant's counting-house in his absence, acting for him, and being obeyed by his foreman, were, without evidence of a direct authority, or of her having acted as her husband's agent in other instances, sufficient evidence of agency to go to the jury.

Campbell, A. G., and F. Kelly, contra, contended that the act of the wife was not evidence against her husband without proof of general agency; that it was an established rule that an authority is not to be inferred from the interference of the alleged agent in the very transaction in respect of which an agency is contended for; and that in this case, the circumstance of the wife's being found, appearing to transact business, in her husband's counting-house, was not a fact to go to the jury as evidence of authority.

LORD DENMAN, C. J.—I think there was very proper evidence to go to the jury. A very large portion of the business of tradesmen is transacted by their wives. The wife, in this instance, is found on the premises, and is seen on one or two occasions apparently transacting the business of the husband. It is not unreasonable to say that the husband *must* have known what was going forward. The foreman was on one occasion present, and obeyed the directions of the wife. It appears to me, from the nature of things, to be strong evidence; stronger than, I believe, it appears to the rest of the Court to be.

LITLEDALE, J.—I think there was evidence to go to the jury, but that it was slight.

PARKE, J.—This is not a special contract made by the wife, but she simply receives a *communication*. There was evidence that she had authority from her husband to *some* extent. Her being in the counting-house, and writing there, is an appearing to transact her husband's business.

It is a slight circumstance ; but the question is, whether it is any evidence at all for the jury.

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PATTESON, J.—I am not prepared to go the length of saying that the wife was the agent of the husband for the making of a contract in respect of the gig. She was, however, her husband's agent for the purpose of receiving communications respecting the business, and therefore his agent for the purpose of this action.

Rule discharged.

The KING v. The Churchwardens of ST. PANCRAS.

A Rule nisi had been obtained by Sir *James Scarlett*, calling upon the defendants to shew cause why a writ of mandamus should not issue directed to them, commanding them to assemble the parishioners in manner directed by 1 & 2 Will. 4, c. 60, in order to elect a vestry and auditors of accounts for the parish. The facts as stated upon the affidavits appeared to be as follows:—

A local vestry acts directs, that vestrymen shall take an oath that they will faithfully execute the duties reposed in them as vestrymen appointed in pursuance of that act, and that

By a local act of 59 Geo. 3, c. xxxix. 191 persons and

they are duly qualified according to the rate of qualification thereby prescribed. By a public vestry act the constitution of the vestry is changed. Vestrymen elected under the new act cannot be required to take the oath prescribed by the former act.

In parishes which have adopted the vestry act of 1 & 2 Will. 4, c. 60, the number of vestrymen to be *lotted out* at the first election of vestrymen under that act is one-third of those vestrymen who at the time of the election were in actual existence, and not one-third of a complete vestry, nor one-third of a complete vestry, deducting from such third the number of the vacancies.

In parishes within the metropolitan police district or the city of London, or in which the rated householders exceed 3000, persons to be eligible as vestrymen, and to be capable of acting as such within 1 & 2 Will. 2, c. 60, must be resident householders rated upon a rental of 40*l.*; but it is not necessary that such rating should be in respect of property in their own occupation.

So, as to eligibility in parishes not being within the metropolitan police district or the city of London.

So, as to capacity to act as vestrymen in such parishes, *semble*.

A parish is not "divided into districts for ecclesiastical or other purposes" within sect. 22 of 1 & 2 Will. 4, c. 60, where a small portion of the parish is annexed to a chapelry created in an adjoining parish, or where the parish has been, for the convenience of collecting the poor-rates, divided into four districts, which districts have been adopted by the returning officer of a borough (within which the parish is situated) for the purpose of taking the poll at an election for members of parliament.

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their successors were appointed vestrymen of the parish of St. Pancras, and were constituted a select vestry.

Sect. 8 gave power to elect new vestrymen, to fill up vacancies, and provided that the number of vestrymen, including the vicar and churchwardens, should never exceed 122.

Sect. 11 required that vestrymen, before they acted, should take an oath to the following effect :—" I, A. B. do swear, that I will faithfully execute the several powers reposed in me as a vestryman of St. Pancras, appointed in pursuance of an act of 59 Geo. 3, intituled, &c. by virtue of the said act or otherwise, and that I am qualified to act as a vestryman of the said parish appointed in pursuance of the said act, according to the rate of qualification by the said act prescribed."

By 1 & 2 Will. 4, c. 60, "for the better regulation of vestries and for the appointment of auditors of accounts in certain parishes of England and Wales," it was by the 1st section enacted, that that act and its provisions should apply to and might be adopted by any parish in England and Wales.

By sect. 22, which regulated the mode of electing vestrymen and auditors of accounts, in parishes adopting that act, it was provided, that when by reason of the populousness of any parish it should have been or should be divided into districts *for ecclesiastical or other purposes*, the votes (where a ballot had been demanded) should be taken in some convenient place in each of the several districts.

Sect. 23 enacted, that vestries elected under that act should, when the act should come into full effect, consist of certain specified numbers of resident householders, according to the number of the rated householders in the parish, provided that the number should never exceed 120(a), exclusive of the rector and churchwardens, who were to be

(a) Which, according to the scale of proportions given by the act, would be the number of which the vestry ought to consist in pa-
 rishes in which there are more than 9000 rated householders, as is the case with the parish of St. Pancras.

ex officio members of the vestry; and provided, that when in any parish a greater number of vestrymen than the proportions given by the act would amount to, have been given by special acts of parliament, the number should remain as before.

Sect. 24 enacted, that at the first election for vestrymen after the adoption of that act in any parish, one-third of the then existing vestry, or the nearest number thereto, but not exceeding the same, should retire from office, (such portion to be determined by lot,) and that the parishioners should elect a number of vestrymen equal to one-third of the vestry; and that on the next annual election one-half, or as near one-half as might be, of the remainder of the first vestry, in the same manner, should be lotted out, and that the parishioners should again elect a number of vestrymen equal to one-third of the vestry; and that on the third annual election the last remaining portion of the vestry as aforesaid should retire from office, and the parishioners should elect vestrymen in like manner and number as before, so as to fill up the vestry to the exact number of vestrymen prescribed by that act.


Sect. 26 enacted, that the vestry *elected* under that act in any parish not within the metropolitan police district or the city of London, should consist of *resident householders* rated or assessed to the relief of the poor of such parish, upon a rental of not less than 10*l.*; and that no person should be capable of *acting* as one of the said vestry, unless he should be the *occupier* of a house, lands, tenements, or hereditaments, rated or assessed upon the afore-mentioned amount of a rental within the parish for which he is to serve. Proviso, that if the parish adopting that act should be within the metropolitan police district, or the city of London, or if the resident householders therein should amount to more than 3000, then the vestry *elected* under that act should consist of *resident householders* rated or assessed to the relief of the poor of such parish upon a rental of not less than 40*l.* per annum.

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26th May, 1832. The parish of St. Pancras having adopted the act of 1 & 2 Will. 4, c. 60, a meeting was held for the election of vestrymen and auditors of account. The vestry at that time consisted of 105 vestrymen, besides the vicar and two churchwardens, there being fourteen vacancies. *Thirty-five* vestrymen, being one-third of the then existing vestrymen, were lotted out, leaving a remainder of *seventy*, and 40 resident householders were chosen by a ballot, taken in the vestry-room of the parish, which is situate in what is called the South Division of the parish. The whole parish is rated in one entire rate, but is, for the convenience of collecting the poor-rates, divided into four divisions, called the North, South, East, and West Divisions. These divisions of the parish were adopted for the purpose of taking the poll, at an election which had taken place for the borough of St. Marylebone, but might at any time be varied by the vestry. Some of the 40 new vestrymen were not rated in respect of an occupation by themselves of premises, the rental of which amounted to 40*l.*; but these, with one exception, were rated in a greater total amount in respect of the premises in their own occupation, together with others belonging to them, but not occupied by themselves, and had paid the rates also to a larger amount. One of these new vestrymen was not rated until after he had begun to act as a vestryman, and another of them had never been rated at all. None of the 40 new vestrymen have taken the oath prescribed by 59 Geo. 3. c. xxxix.

In May, 1833, another meeting for the election of vestrymen and auditors of account was held, and on that occasion the same mode of calculating the number of vestrymen to be lotted out was adopted as had been used before, that is to say, one-half of those that then existed of the *seventy* who had remained on the occasion of the former election. A ballot for the election of new vestrymen was taken in the same manner as before, and 40 resident householders were elected. Of these some were circumstanced in a similar

manner as to the amount at which they were rated, as those mentioned in relation to the former election; and, as before, none of them have taken the oath prescribed by 59 Geo. 3. A part of the parish of St. Pancras, at the northern extremity adjoining the hamlet of Highgate, had been a short time previous to the last-mentioned ballot attached to a chapelry, which was then formed in Highgate of part of the parish of Hornsey, used for and in connection with that parish, but this district did not form an ecclesiastical district or division of the parish of St. Pancras, but was separate and distinct from it. These two elections were objected to on the part of the person applying for the rule, and the grounds of objection as set out in the affidavits, upon which the rule nisi was granted, were these:—first, that the number to be lotted was calculated upon a wrong principle; that the number lotted out on the first election should have been 40, (as being the number nearest to one-third^(a) of 119,) reduced by the number of vacancies; according to which rule the number then lotted out should have been 26 instead of 35; and that on the second election the number lotted out should have been the half of 70, the *half* to be reduced by the number of vacancies; secondly, that on both occasions the poll was taken in only one of the four districts; thirdly, that some of the persons elected on both occasions were not duly qualified, as not being rated at a rental amounting to 40*l.* in respect of premises occupied by themselves; fourthly, that the new vestrymen elected on both occasions had acted without having previously taken or subscribed the oath prescribed by 59 Geo. 3, c. xxxix. The fifth objection was to the second election only, and was, that the poll was taken in only one of the *ecclesiastical* districts of the parish, the parish being a populous parish, and divided into two districts for ecclesiastical purposes.

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(a) 39 would appear to be the number nearest to *and not exceeding* a third of 119.

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The number to
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of vestrymen.Third point :
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ing.Fourth point :
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take the oath.

First point :

F. Pollock, Blackburne, and Adolphus shewed cause.

The mode adopted of ascertaining the number of vestrymen to be lotted out was correct. The act does not say that one-third of those persons who ought to constitute the vestry shall be lotted out, but one-third of the then existing vestry.

II. This parish comes within the latter part of the 26th section of the Vestry Act, and therefore the qualification of these vestrymen must consist in their being "resident householders rated or assessed to the relief of the poor, upon a rental of not less than 40*l.* per annum." These terms are satisfied if the party reside in one house assessed at 10*l.* a year, and be assessed as landlord at 30*l.* a year for other houses. Granting that one or two persons were not properly elected, that circumstance will not render the whole election void.

III. There is no such division of the parish as is contemplated by the act. There is an entire rate for the whole parish; paupers are not removed from one district to the other. The division is merely for the convenience of the collectors of the poor-rates. They may be varied at pleasure by the vestry, and have been altered from time to time. Nor is there any *ecclesiastical* division of the parish. The attaching of part of the parish of St. Pancras to the chapelry of Hornsey, is a matter entirely between the impropriator of the living and the incumbent.

IV. Where by the common law there is no authority to administer a particular oath, but the power is given by statute, its form cannot be varied. The oath is an oath of office, and no intendment will be made in favour of it. The absurdity of requiring the oath to be taken in the form directed by the act at the present time, when the local act is no longer in operation, is evident.

Sir James Scarlett, contra. I. The number of vestrymen to be lotted out should have been 40, as being the nearest number to one-third of 119, and from that number

of 40 the number of vacancies should have been deducted. The clause in the Vestry Act makes a distinction between "the vestry" and "vestrymen." "The then existing vestry," (of which one-third is to be taken,) is meant to be understood as comprising the *full* number of vestrymen of which it ought to consist, according to the local act. It seems to be reasonable, in conducting the election, to consider the vestrymen who have died since the last election, or have otherwise vacated the office, as already lotted out, and consequently to deduct their number from the number that would otherwise have to be lotted out.

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II. As to the qualification of vestrymen, it seems to be admitted, that as to parishes not within the metropolitan district, a vestryman must be the occupier of a house for which he is rated at the amount prescribed. The question, then, is, whether the legislature intended that there should be a different qualification, except as to the amount of the rental to be rated, within the metropolitan police district, the city of London, and the larger parishes. There seems to be no reason to suppose that any other distinction was intended. That part of the clause respecting parishes within the metropolitan police district, &c. is introduced in the form of a proviso, and the language of it is the same as that part of the section which describes the qualification necessary for vestrymen *elected* under that act. In each case the vestry is to consist of *resident householders rated to the relief of the poor*. The expression "resident householders rated," is explained by reference to the second branch of the section, in which it is said, that "no person shall be capable of *acting* as one of the said vestry, unless he shall be the occupier of a *house, lands, tenements, or hereditaments rated* or assessed upon the afore-mentioned amount of rental within the parish for which he is to serve." The proper way of construing this is, to say that the party must be the occupier of a *house, &c. rated*, and not an *occupier rated*. [Parke, J. The act does not say that no person shall be capable of acting, unless he be *rated in respect of*

Second point.

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the house, &c. which he occupies. The words "rated and assessed," as they stand in the clause, may be taken to relate to "occupiers," and then the whole section will be uniform; whereas if the words "rated and assessed" be taken in connection with "house," &c., this part of the section will be incongruous with the former part, where it is said that the vestry is to consist of *householders rated*.] The last antecedent to "rated," &c. is "house," &c., and not "occupier." In order to make the words "rated," &c. apply to the person and not to the thing, the clause must be construed as if it were "rated occupiers of a house," &c. But taking the expression "*resident householder rated*" at so much per annum, that, in its common acceptation, implies that the householder is to be rated in respect of the house in which he resides.

Third point. III. As to the place of election. The parish is divided into four districts for some parochial purposes, and at elections for members of parliament the poll is taken in those four districts. [*Parke, J.* The divisions for those purposes may be varied.] There is also an ecclesiastical division, and the act is imperative.

Fourth point. IV. The oath cannot be taken in the exact words of the local act, but it ought to be taken now by the vestrymen, for the faithful discharge of their duties under the present act.

Fourth point. LITLEDALE, J. (*a*).—It is objected that the vestrymen elected have not taken the oath prescribed by the 59 *Geo. 3*, c. 39, s. 11; the form of which is as follows: [his Lordship here read the oath, the material parts of which are set out *ante*, p. 426, and then proceeded thus]: I must own that this oath appears to me wholly inapplicable to the case of a vestryman elected under 1 & 2 *Will. 4*. The oath is, that the party taking it will faithfully perform the duties imposed on him by the 59th *Geo. 3*, and that he is

(*a*) Lord Denman, C.J., having when at the bar advised upon the case, left the Court during the argument.

qualified to act as a vestryman of the parish, appointed in pursuance of the said act, according to the rate of qualification by the act prescribed. An oath cannot in this manner be transferred from one act of parliament to another. I should say that it is not only *unnecessary* for a vestryman to take this oath, but that it would be *highly improper* in him to do so.

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Another objection, which is the most material, is as to the qualification of the vestrymen. It appears to me sufficient if the vestryman be a householder, and is rated to the poor upon a rental of 40*l.* per annum, and that it is not necessary that he should be rated in respect of his own occupation. Therefore if he be rated as landlord to the whole amount of the 40*l.* he would be eligible. It may be said that the part of the section, as to vestrymen *acting*, was intended to be embodied in the proviso as to parishes within the metropolitan police district, and certainly one would suppose that it was intended that the nature of the qualification should be the same in town as in the country. I do not, however, see how we are to apply this second branch of the section to the metropolitan parishes, and therefore I think it not necessary to express any opinion as to the construction proper to be put upon the language of it. There is another question with regard to those who had at the time of the election no qualification, but have been rated subsequently. A qualification acquired subsequently will be of no avail; the party should be qualified at the time of the election. Second point.

Then as to the number to go out of office by lot; the 24th section of 1 & 2 *Will.* 4, provides, that at the first election for vestrymen after the adoption of this act, in any parish, one third of the then existing vestry, or the nearest number thereto, but not exceeding the same, shall retire from office, such portion to be determined by lot. It is said that in this section a distinction is made between vestry and vestrymen, and that the former means the aggregate body of which the vestry ought to be composed. I First point.

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think it means those vestrymen who are actually alive at the time the election takes place.

Then as to the alleged divisions of the parish. There is no recognized division of the parish except that part which is annexed to the chapelry of Hornsey, and that is not a district of the parish. The other divisions are not recognized divisions. The same authority which created them might alter them.

Second point.

PARKE, J.—This is an application for a mandamus to the churchwardens of St. Pancras to assemble the parishioners to elect a vestry and auditors of accounts for the parish. The grounds of the application are four. First, it is said that some of the persons who were elected vestrymen had not a sufficient qualification. I have no doubt of the construction which we are bound in law to put upon this statute. It is by no means improbable that it was the intention of the framer of this act, that persons should not be qualified unless they were householders occupying premises, for which they were assessed at 40*l.* per annum; but in construing a statute the express words must always be looked at; and the rule is, that we are to collect the sense of the legislature from the language which they have employed, according to its grammatical sense, unless that would lead to some manifest absurdity. I think that, upon the language of the 26th section, if a resident householder is rated at 40*l.* a year, in respect of any premises, he is eligible, and that it is not necessary that he should be rated in respect of the subject of his own occupation. This is the 26th section: [his Lordship here read the 26th section, which is set out, *ante*, p. 427, and then proceeded:] There is no expression in this section requiring that the party shall be rated *in respect of premises in his own occupation*—If it had been so intended, we must suppose that it would have been introduced. I cannot adopt the construction which Sir J. Scarlett has endeavoured to put upon the words “occupier of a house, &c. rated or assessed upon the afore-mentioned rental.” I think the true construction is

that the occupier, and not the house, is to be rated; and this construction makes the whole of the clause uniform in its provisions. If some persons were improperly elected who were not qualified, it is clear that the mandamus ought to go to fill up the vacancies, but the election would not for that reason be altogether void. The consequences would be very serious if it were so.

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Another objection is, that an improper number of vestry- First point.
 men has been lotted out of the old vestry. The 24th section provides, that as the first election for vestrymen after the adoption of this act, in any parish, one third of the then existing vestry, or the nearest number thereto, but not exceeding the same, shall retire from office (such portion to be determined by lot.) In the parish of St. Pancras, at the time of the adoption of the act, the vestry, when full, consisted of 119. Fourteen had died, so that the vestry was not complete. Three constructions may be put on this section: 1. That from forty the fourteen vacancies should be deducted, and twenty-six should be lotted; which construction, it is, I think, impossible to support. A second is, that *forty* should be lotted out; but this would be unreasonable, for if by deaths the number had been reduced to forty, the whole would have had to go out at once. A third construction is, that one third of the existing vestrymen are to retire, and this, which is the construction that has been adopted at the elections in question, is, I think, the proper construction.

Another objection is, that the vestrymen have not taken Fourth point.
 the oath required by the local act. That objection is disposed of by saying, that the oath is of necessity no longer applicable.

The remaining objection is, that by 22d section the poll Third point.
 ought not to have been confined to one place. But the division of the parish of St. Pancras into the four districts which have been mentioned, is only for the convenience of the collectors of the poor-rates. It is then said, that the parish is divided into two *ecclesiastical* districts, there having

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been an annexation of a portion of the parish to the chapelry of Hornsey. But this is no *division* of the parish. A small portion is taken away for a particular purpose. I am of opinion, therefore, that the poll was rightly taken, and that upon the whole the mandamus should not be issued.

PATTESON, J.—I am of opinion also that this rule should be discharged, but I think it unnecessary to go at length through all the objections which have been made to the goodness of the elections.

Second point. With respect to the question of qualification I have some difficulty, on account of the difference of the language used in various parts of the same clause. When different terms are used in the same act, it is natural to suppose that the legislature intended to express a different meaning by each expression. I have great doubts whether the framer of the act did not apply the words, rated and assessed, in the second branch of the first part of the clause, to the words "house, lands, tenements, or hereditaments," and not to "occupier;" but this is immaterial to the present question, as that part of the clause does not relate to parishes in the metropolitan district. With respect to those persons who were not rated at the proper amount at the time of the election, a mandamus might be issued to fill up their places, but a completely new election cannot for that reason be had.

Fourth point. With regard to the oath. It is an impossibility for any one to take it.

First point. The proper number was lotted off at the election. It is unnecessary that I should say more on that subject.

Third point. The objection, as to the division of the parish, is answered by denying that such is the fact within the meaning of the statute.

Rule discharged.



Ex parte KING.

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HINDMARCH had obtained a rule, calling upon Messrs. *Joseph Allen Higgins* and *Robert Higgins*, and Messrs. *Matthew Elgie* and *Thomas Elgie*, to shew cause why their several bills of costs against *William King*, delivered to and paid by Messrs. *Bedford* and *Tidcock*, his attorneys, according to their undertaking, should not be referred to the master to be taxed. Messrs. *Higgins* and Messrs. *Elgie*, who were attorneys, had respectively been employed by *King* to effect some mortgages on his property, and for this business became indebted to them. In each of the bills of costs there was a charge "for preparing and ingrossing a warrant of attorney as a collateral security," but it did not appear either from the bills of costs or from the affidavits filed in support of the rule, in what Court the warrant authorized the entering up judgment. Messrs. *Bedford* and *Tidcock* were subsequently employed by *King* as his attorneys, and in that capacity gave Messrs. *Higgins* and Messrs. *Elgies* an undertaking to pay these bills. An action having commenced upon this undertaking the amount of the bills was paid. *King* then obtained the above rule nisi, against which

A Court has no power to order the bill of an attorney to be taxed, unless it appear that some part of the business was done in the Court to which application for the order is made.

Watson now showed cause. The charge for preparing the warrant of attorney is not a taxable item. But there is a preliminary objection which will dispose of the case. It does not appear that this was a warrant of attorney to confess judgment, still less that it was a warrant of attorney to confess judgment in this Court. It may not be taxable in this Court, for the statute (a) says, that the bill shall be taxed in the Court where the majority of the business has been done. Assuming that the Court will exercise a discretionary power of ordering the bill to be taxed, it does not appear that the parties against whom the application is made are attorneys of this Court. He was stopped by the Court.

(a) 2 Geo. 2, c. 23, s. 23.

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Hindmarch in support of the rule. The item is clearly taxable, and this Court may therefore order the whole bill to be taxed by the master. [*Littledale, J.* The Court has no *general* power to order a bill to be taxed, and this has been frequently decided.]

LORD DENMAN, C. J.—The warrant of attorney should have been brought before the Court.

By the COURT.

Rule discharged. (*b*)

(*b*) See *Dagley v. Kentish*, 2 Barn. & Cressw. 158; see also Barn. & Adol. 411; *Wilson v. Guteridge*, 4 Dowl. & Ryl. 736; 3 *Tidd's Practice*, vol. i. p. 332, 9th edition.

HANBURY and others v. JOHN ELLA and
 M. PHILLIBROWN.

Where a contract by which *A. guaranteed to B. the amount of a debt to be contracted with B. by C.*, was described in pleading as a promise to pay the debt to be so contracted, the Court sanctioned an amendment ordered at nisi prius, by substituting "guarantee" for "pay."

ASSUMPSIT. The first count stated, that in consideration that the plaintiffs, at the request of the defendants, would supply one *Alfred Ella* with beer, the defendants ~~promised~~ the plaintiffs to pay them the amount of the same supplied from time to time by the plaintiffs to *Alfred Ella*, the liability of the defendants to pay the plaintiffs in that behalf being limited to 50*l.* Averment: that the plaintiffs supplied *Alfred Ella* with beer to the amount of 100*l.*, and although the time for payment of the price of the said beer by *Alfred Ella* to the plaintiffs had long since elapsed, yet *Alfred Ella*, although requested, had not paid the amount. Of all which premises the defendants had notice.

The second count stated, that in consideration that the plaintiffs, at the request of the defendants, would supply *Alfred Ella* with beer, the defendants undertook and *promised* the plaintiffs to be accountable to them, and to pay them the amount so supplied from time to time by the

plaintiffs to *Alfred Ella*, it being understood between the plaintiffs and the defendants, that the liability of the defendants to the plaintiffs should be limited to 50*l.* Averment, *ut supra*.

At the trial before *Denman*, C. J., at the sittings for London, after last Hilary term, the plaintiffs gave in evidence the following document, addressed to the plaintiffs: "In consideration of your supplying *Alfred Ella* with beer, we do hereby *guarantee* to you *the amount* of the same supplied from time to time. Nevertheless it is understood, that our liability to you is limited to 50*l.*" It being objected that this agreement did not support the declaration, the plaintiffs, referring to Lord *Tenterden's* act (*a*), and 3 & 4 Will. 4, c. 42, applied to the Lord Chief Justice to amend, by altering the allegation in the first count, that the defendants *promised to pay* the amount, into an allegation that the defendants *promised to guarantee* the amount. His lordship allowed the amendment, under 3 & 4 Will. 4, c. 42.

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Crowder moved for a new trial. The defendants are entitled to a nonsuit or a new trial on two grounds: 1st. The counts, as amended, were not supported by the evidence. The instrument absolutely guaranteed the payment of the beer supplied to *Alfred Ella*, whereas the count stated that the defendants *promised to guarantee*. (The Court intimated that this objection was not tenable.)

2. The amendment was not authorized by any statute. Lord *Tenterden's* act was first cited at the trial, but that act, it is clear, only applies to matters not material to the merits of the case. That act was not intended to apply to a case where there has been a material misconception of the contract. From the preamble to the 23d section of 3 & 4 Will. 4, c. 42, which refers to the amendments authorized to be made by Lord *Tenterden's* act, it might perhaps be inferred that it was intended that that section should have a more extensive operation than Lord *Tenterden's* act,

(a) 9 Geo. 4, c. 15.

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and should extend to all cases, whether there was or was not a writing, but it is doubtful whether it can be held to apply to a case like this, where the contract, as set out, is a contract of a different nature from the contract as proved in evidence. The contract as proved in evidence, and as set out by the amendment, is a *guarantee*, which imports a promise to pay the debt of another in the event of his refusing to pay; whereas the contract, as originally alleged, was a promise to pay the debt as a debt of the defendant himself. The one is a conditional, and the other is an absolute promise. The former is void under the statute of frauds, unless, as was the case here, the contract was in writing; the other is good by parol. Therefore by the amendment, a contract of an essentially different nature was set out. [*Parke, J.* It was intended that this act should extend to all cases where the defendant has not been misled by the misdescription.] If such an amendment as was made in this case be allowed, it will give rise to the greatest laxity in pleadings. [*Littledale, J.* Looking at all the averments in the first count, with the exception of the precise form of the promise, it seems to me that the contract declared on was a guarantee.] Then no amendment was necessary. It cannot certainly be contended in this case, that the defendants were prejudiced, as there was but one contract between the parties. But that may be said in a great majority of the cases that will arise; so that if the criterion is whether the party was prejudiced by the misdescription, there will seldom be a case in which the judge will refuse to amend. [*Parke, J.* The misdescription is perfectly immaterial to the *merits* of this case. You cannot have misunderstood the issue, or been led into any mistake.]

By the COURT—

Rule refused.

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LEE v. NIXON and DAVISON.

ASSUMPSIT by the plaintiff, as one of the trustees appointed by an act of 7 Geo. 4, c. clxxiv (a), (for making a certain turnpike road and branches,) for the recovery of an arrear of the rent of certain tolls, receivable at certain gates. *Nixon* suffered judgment by default, and *Davison* pleaded non assumpsit. At the trial before *Denman*, C. J., at the Northumberland summer assizes, 1833, a verdict was found for the plaintiff for the amount of the arrears, subject to the opinion of this Court on the following case :


30th April, 1830. At a meeting of trustees, at which the plaintiff and four other trustees were present, the tolls payable at two of the gates on the road were let by public auction, subject to certain conditions, to *Nixon*, the highest bidder, for 692*l.*, whereupon *Charles Head*, as clerk to the trustees, by the direction of the chairman, filled up and signed a memorandum of agreement pursuant to the conditions. *Nixon* signed the agreement at that time, and *Davison* a few days afterwards. One of the conditions of sale was, that the highest bidder should enter into a lease with the trustees for the taking of the tolls and paying the money at the time specified in another of the conditions, with two sufficient sureties, to the satisfaction of the trustees, for payment of such money. By the memorandum of agreement, which recited that *Nixon* had become the highest bidder for the tolls at the two gates, at 692*l.* a year, and had produced *Davison* and *Milburn* as sureties, the trustees, by *Charles Head*, their clerk, contracted and agreed with *Nixon* to let, and *Nixon* agreed to take, the said tolls for one year, at 692*l.* And *Nixon*, as farmer and renter of the tolls, and *Davison* and *Milburn* as his sureties, did thereby severally promise, undertake and agree, to and with the trustees, that *Nixon*, his executors &c., should pay the said yearly rent. This agreement was signed by *Head* for

Where *A.* as farmer and renter of certain tolls, and *B.* as his surety, severally promise, undertake and agree to and with the lessors, that *A.*, his executors &c., shall pay a certain yearly rent; *A.* and *B.* cannot be sued jointly upon default by *A.* to pay the rent.

Where it appears upon an instrument that a promise by two contractors is intended to be joint, it may be treated as such, although the promise be in terms several only.

Whether a contract for the demise of tolls by the trustees of a turnpike road, signed by one only of two persons, appointed by the trustees to the office of clerks to the trustees, is a valid demise under 3 Geo. 4, c. 126, s. 57, *quare*.

(a) Local but public.

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the trustees, and by Nixon and Davison, but not by Milburn.

In order to prove that *Head* was clerk to the trustees, the book containing the entries of the proceedings was produced, and an entry to the following effect was read: "Ordered, that *John Bell* and *Charles Head* be appointed to the office of clerks to the trustees of the road, and all its branches, at the yearly salary of 50*l.*"

Bell and *Head* were, at the time of the appointment and of entering into the agreement, attorneys, carrying on business in partnership.

Nixon, under the letting above mentioned, received the tolls for one year, from 13th May, 1830; and at the time of commencing the action, the sum of 213*l.* of the rent was and still is in arrear.

The points for argument stated in the margin of the above case were, 1st. Whether the agreement was well signed by *Charles Head* alone, so as to be a demise of the tolls under 5 *Geo.* 4, c. 126, s. 57, and whether, therefore, the agreement was binding on the defendant *Davison*, as surety. 2dly. Whether the contract is not several only, and whether, therefore, this action jointly against both is maintainable.

By section 2 of 7 *Geo.* 4, c. lxxiv, the powers and provisions of the General Turnpike Act^(a) are, with certain exceptions, extended to that act.

By 7 *Geo.* 4, c. lxxiv, it is enacted, that the trustees shall not appoint the *person* who may be appointed to act as their *clerk*, to be treasurer, nor vice versâ; and this is the only mention of the former office to be found in the act.

Section 57 of 3 *Geo.* 4, c. 126, makes valid all contracts and agreements for the farming or letting of tolls on any turnpike road, signed by the trustees or commissioners letting such tolls, or any two or more of them, or by the *clerk* or treasurer and the lessee or farmer of such tolls and his

(a) 3 *Geo.* 4, c. 126.

sureties, notwithstanding the same might not be by deed or under seal.

Section 74 enacts, that the trustees and commissioners of any turnpike road may sue or be sued in the name of any one of such trustees or commissioners, or of their *clerk or clerks* for the time being.

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Cresswell, for the plaintiff. This action was brought for the purpose of reviewing the decision in *Bell v. Nixon* (a), in which the Court of Common Pleas decided that the agreement signed by *Head* only, was not a binding agreement under 3 Geo. 4, c. 126, s. 57, for that *Bell* and *Head* together were but *one* clerk, and should both sign, in order to make a complete execution. The Court, in coming to this decision, proceeded upon the authority of *Auditor Curle's* case (b), which it was thought to resemble. There, two persons were appointed to the office of *one* of the auditors, and were to be together called "auditor;" therefore of course one could not act without his companion. But this case is different. The 74th section and several other sections of 3 Geo. 4, c. 126, contemplate the existence of more than one clerk; and by the order for the appointment of *Bell* and *Head*, the office to which they are appointed is called that of *clerks*. Reliance is placed by the defendant on the fact of *Bell* and *Head* being in partnership, and the salary being joint. But though they are in partnership as attorneys, the trustees might well avail themselves of the services of either one alone, as it might suit their convenience, and the fact of the partnership accounts for the circumstance of the salary being joint. The act done by *Head* was merely ministerial; he might have signed the names of the trustees present.

First point:
Joint clerkship.

II. A second objection is now made to the plaintiff's right to recover against *Davison* in this action, which is, that the *contract* is *several*, and the *action*, *joint*. The

Second point:
Contract several.

(a) 9 Bingh. 393; 2 Moore & Scott, 534. (b) 11 Co. Rep. 2.

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introduction of the word "several" into the contract, makes it several as well as joint, but does not make it a mere several contract. Where two persons by one instrument agree for a particular object, that alone makes the contract joint. Where a covenant is joint in its terms, but several as to the acts to be done by the parties, it is a separate contract (*a*), and the converse of this proposition, it is apprehended, is true; *Servante v. James* (*b*). In *Hall v. Smith* (*c*), the action was brought upon promissory notes in this form, "I promise to pay" &c., which were signed by the defendant for himself and his co-partners. The Court held that the word "I," at the beginning, made the contract *several*. The cases relied on for the plaintiff in that case are in point here. In *March v. Ward*, a note began, "I promise to pay," and was signed by two persons, and it was held that an action might be maintained against each severally. In *Lord Gahway v. Matthew and Smithson* (*d*), where the promise was in the singular number, and was signed by one in the name of himself and co-partners, it was held that an action could be maintained against the party signing and one of the co-partners jointly. In *Clerk v. Blackstock* (*e*), the note began "I promise to pay," and was signed by two persons; held, that the note might be treated either as joint or several. *Sayer v. Chaytor* (*f*) is to the same effect. The word "several" introduced into this agreement, shews that each intended to bind himself separately as well as jointly. They both promise that the same thing shall be done. If this agreement be several only, a release to one would not discharge the other, according to *Matthewson's* case (*g*), but it is apprehended that a release to one in this case *would* discharge the other. The word "severally" here used may refer to the several *characters*. It may mean "we do, one as principal and the other as surety, contract

(*a*) Vide *Eccleston v. Clipsham*,

(*d*) 1 Campb. 403.

1 Saund. 153.

(*e*) Holt's N. P. C. 474.

(*b*) 10 Barn. & Cressw. 410.

(*f*) 1 Lutw. 696.

(*c*) 2 Dowl. & Ryl. 584; 1

(*g*) 5 Co. Rep. 22.

Barn & Cressw. 407.

and agree." Words are to be construed most strictly against the party using them. These must be taken to be the defendant's words.

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First point.


W. H. Watson, contra. I. This is one office filled by two persons. The local act shews that there could be but one clerk; the 57th section of 3 Geo. 4 shews it; and the appointment shews that these parties were jointly appointed to *one office*. The expression "clerk or clerks," in the 74th section of 3 Geo. 4, can apply only to cases where, by the local act, *clerks* are appointed for distinct lines of road. In *Rex v. The Trustees of the Cheshunt Roads* (a), the Court held, that the *office* of clerk to the trustees was of such a permanent nature that a mandamus might issue to restore him. This being one *office* filled by two persons, *Bell v. Nixon* (b), a demise by one alone is invalid; *Auditor Curl's* case. Two persons fill the *office* of *sheriff* of Middlesex, who cannot act singly; and as to the shrievalty of London, though they are called *sheriffs*, they cannot act alone, because the *office* is but one: *Bacon's Abr.*, Officer, K.

II. A *several* contract is very different in its nature from a contract *joint and several*; and a consideration of the points of difference may afford some assistance in construing this instrument. In the first place, it is very doubtful whether, in the case of a *several* contract, there is contribution in law, though equity in such a case sometimes steps in, and parties may be compelled to contribute as co-sureties in *equity*, who may not be liable at *law* (c). Another reason why the party may have wished to bind himself *severally* is, that if the contract were joint and several, the trustees might sue the contractors jointly, and thus the surety might be deprived of the benefit of the evidence of his principal, which is often a matter of the greatest importance. Again, if the contract be *joint and*

(a) MS.

(b) 9 Bingh. 393; 2 Moore & Scott, 534; ante, 443.

(c) Vide *Cowell v. Edwards*, 2 Bos. & Pull. 268; *Deering v. Earl of Winchelsea*, ibid.

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several, a promise or a payment by the principal will take the case out of the statute as against the surety; otherwise, if the contract be *several*; *Burleigh v. Stott* (a). If the action were joint, the surety might be deprived of a set-off in his own right. These considerations will weigh with the Court, if they think that upon the face of the agreement it is doubtful whether the parties intended to bind themselves *severally*, or *jointly and severally*. The parties, by this contract, distinctly contract and agree *severally*. No argument can be drawn from the circumstance of the parties having a joint interest, or from one of them having no interest, except in a case where the contract is ambiguous; *Anderson v. Martindale* (b), *Collins v. Prosser* (c). Where the parties distinctly say that they contract *jointly*, or that they contract *severally*, the Court cannot say otherwise; for to do so, would be to make and not to expound the contract. In all the cases cited, the words of the parties were equivocal, and there the Court might well be at liberty to decide either one way or the other, according as the parties had a joint interest or the contrary, or according to what might be presumed to be their intention. Here, the parties leave the Court no room to speculate. The argument upon *Matthewson's* case (d) involves the whole question. If a release to one would discharge the other, it is because it is joint; and if it be not joint, the release to one will not discharge the other.

First point.

Cresswell, in reply. The clause in the local act cannot affect the question as to the validity of a demise signed by one clerk. It is the common clause, found in every act of the kind, inhibiting the trustees from appointing the same person to fill two offices under them. It does not follow from that, that they cannot appoint more clerks than one.

Second point.

It is probable that the word "*severally*" was introduced

(a) 2 Mann. & Ryl. 93; 8
 Barn. & Cressw. 86.

(b) 1 East, 497.

(c) 3 Dowl. & Ryl. 112; 1
 Barn. & Cressw. 682.

(d) 5 Co. Rep. 22.

into the contract only for the purpose of distinguishing the principal from the surety, and in order to prevent any difficulty that might arise in consequence of the doubt which the Courts have lately entertained as to their power of going into the question whether a party signs an instrument (a promissory note) as principal or surety, where the fact does not appear upon the face of the instrument. *Burleigh v. Holt* shews that a part payment by one takes the case out of the statute of limitations, where the contract is *joint and several*; but it does not shew that where the contract is *several* only, it would not operate in the same way. There cannot be a doubt in this case but that a *release* of the principal would be a discharge of the surety. [Lord Denman, C. J. That might be upon another ground. Would a release of the *surety* operate as a discharge of the *principal*? That, I apprehend, is the proper way of putting it.] It is submitted that it would.

With regard to the set-off, it would make no difference whether the action was joint or several. [*Patteson*, J. Suppose work had been done by the surety; could that be set off in a joint action?] It is submitted that it could. [*Patteson*, J. I think not (a).]


LORD DENMAN, C. J.—Had it been necessary to decide the first point, I should have wished for time to consider of my judgment; but it is not necessary to enter into that question. If the word “severally” has *any* meaning, it must have that which the defendant contends for, and the agreement cannot be treated as joint. If the trustees can sue upon this agreement at all, they can only sue the parties in the manner in which they have chosen to contract. Many reasons why the defendants should prefer to contract

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(a) Vide *Jones v. Fleming*, 7 N. P. C. 469, n.; *Grant v. Royal Barn. & Cressw.* 217; *Puller v. Roa, Peake*, N. P. C. 197; *ibid.* 3d ed. 260; *Stacy v. Decy*, 2 Esp.

Exchange Assurance Company, 5 Maule & Selw. 439.

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severally have been suggested; and by that word "*severally*" the surety has taken care to protect his own interest.

LITLEDALE, J.—We must take the word "*severally*" according to common understanding. The word, unless explained by other parts of the agreement, must operate to make the liability *several*. Certainly, where on the face of the instrument it appears that the contract is joint, it may be so treated, notwithstanding the word *several* occurs. But in the present case it is not so. It is more in the common course of things that the surety should be bound separately from the principal rather than with him. In *Collins v. Prosser* the words implied a *joint* liability, yet the bond was held to be *several* for particular reasons. If it could be shewn here that "*severally*" was not meant to be taken in its ordinary sense, we might reject it, but no reason is shewn for so treating the contract.

PATTESON, J.—If, by putting the ordinary construction upon the word "*severally*," we should have done violence to the rest of the contract, we might have rejected it in some way. I think it very probable that Mr. *Cresswell's* solution of the expression, namely, that the principal *by himself* as principal, and the surety as surety *by himself*; is the right one; but still it is equally fatal to his case.

WILLIAMS, J.—Mr. *Cresswell* has laboured to shew that there is something in the nature of the agreement to take away the ordinary meaning of the word "*several*." I confess I see no reason for saying that the language is inconsistent with the object of the agreement. One party agrees to pay the rent, and the other that he will come in and guarantee its being done. There is no agreement that all shall do one and the same thing.

Judgment of nonsuit entered.

CURTIS v. GREATED.

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ASSUMPSIT for money had and received, brought to recover 50*l.* received by the defendant from the plaintiff by way of deposit upon a sale by auction of certain houses, and which sale the vendor had not completed. At the trial before Denman, C. J., at the sittings after Trinity term, 1833, the following facts appeared :—

The defendant, an auctioneer, was employed by one Jones to sell certain leasehold premises at Hampstead. An auction took place; and the plaintiff becoming the purchaser of two houses at 680*l.*, paid 50*l.* as a deposit to Stevenson, Jones's attorney, and signed on the back of the conditions of sale a written contract for the purchase of the houses; which contract was unstamped. A few days after the sale, the defendant signed a receipt, in which he acknowledged that he had received of the plaintiff 50*l.* "for the deposit on the sale by auction of the premises described as lot 4 in the printed particulars and conditions of sale." The conditions of sale being offered in evidence, Campbell, S. G. objected that they could not be put in distinct from the agreement, and that the plaintiff could not recover without production of the written contract. The Lord Chief Justice thought that the conditions of sale were evidence of the contract upon which the 50*l.* had been paid, and received and admitted them to be read. One of the conditions of sale was for the delivery of an abstract of title within ten days, and it was denied that the vendor had failed in the performance of this condition. The third condition of sale is as follows :—"That the purchaser shall immediately pay down a deposit of 20*l.* per centum on his or her purchase money, into the hands of Mr. Greated, and sign an agreement for payment of the remainder to the proprietor of the estate on the 20th March next." A verdict was found for the plaintiff, damages 50*l.*; but leave was given to the defendant to move for a nonsuit, upon the question whether it was or was not necessary that the

Upon a sale of houses by auction according to certain particulars and conditions of sale, one of which was for the delivery of an abstract of title within 10 days, and another for the payment of a deposit to the auctioneer, the purchaser of two houses pays a deposit, signs an agreement as purchaser, and obtains a receipt from the auctioneer for the money paid as for a deposit on a sale by auction of the premises described in the particulars and conditions of sale.

The abstract of title not being delivered, the purchaser brings an action against the auctioneer for the recovery of the deposit: Held, that the production of the receipt, and of the conditions of sale, without producing the written contract signed by the purchaser, was insufficient.

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agreement should be produced. In last Michaelmas term, *Campbell*, S. G. obtained a rule nisi for a nonsuit or a new trial; against which

Sir *J. Scarlett*, and *W. H. Watson*, now shewed cause. It was not necessary to produce the written contract. The plaintiff produced a receipt for 50*l.* paid as a deposit upon a lot sold, to which it is admitted that the vendor could not make a title. [*Parke*, J. How do we know the *terms* upon which the deposit was made, without seeing the *contract*? How do we know that the deposit is to be returned?] If a man pay down 50*l.* in part-purchase of an estate, and that estate turns out to be a mere nullity, he is entitled to recover it as money paid without consideration. If the written contract entitles the other party to retain at all events, he should produce it. The plaintiff has shewn that the consideration upon which the 50*l.* was paid fails: [Lord Denman, C. J. You cannot do that. You cannot shew what *was* the consideration without production of the agreement. *Parke*, J. The defendant says there appears to be a *writing* signed by the plaintiff, relating to this deposit; therefore the fate of the deposit must depend upon the terms of the agreement.] The plaintiff has shewn a contract between the *auctioneer* and the purchaser, with reference to the deposit, without any written contract. The agreement in writing was *res inter alios acta*;—it was between the *vendor* and the purchaser. The auctioneer is only a stakeholder, and is bound to return upon the failure of the condition upon which he was to retain; *Lee v. Munn* (a). After the contract was entered into by the auctioneer, any contract entered into between the vendor and the purchaser could not affect his liability. [*Patteson*, J. The auctioneer being a depositary, he is to retain until it is shewn that the seller is not entitled to retain, which could only be shewn by the agreement between the vendor and purchaser. He holds the deposit upon condition to return

(a) 8 Taunt. 45.

it in case the agreement of the vendor with the purchaser is not performed.] The printed particulars taken in connection with the knocking down of the lot to the plaintiff, and the signing of the receipt, shewed a complete parol agreement between these parties. The agreement entered into afterwards was between vendor and purchaser, and if it revoked the authority of the auctioneer to return, or in any way varied the contract between the parties, the *defendant* ought to shew it.

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Campbell, A. G., and Manning, contra. The action is substantially brought upon an agreement which is not produced; therefore the plaintiff ought to be nonsuited. If the plaintiff says that there has been a failure of the consideration, he must shew, *by legal evidence*, first, what the consideration was, and then that it has failed. The *agreement* is the only evidence of what the contract was between these parties, and the consideration of the deposit can of course only appear from the contract between the depositor and the party for whose benefit the deposit is made, and who is the meritorious cause of such deposit. It is said that the conditions being referred to in the receipt are evidence of the consideration upon which the money was paid; and that the contract must be taken to have been according to those conditions; but the conditions are not binding until they are *adopted*, and the adoption is only signified by the *contract*. It is, indeed, clear that the contract did *not* adopt the conditions; for the third condition, upon which it is supposed that this deposit was made, requires that a deposit of 20*l.* per cent. shall be paid to the auctioneer, whereas here only 50*l.* is paid upon a purchase for 680*l.* The receipt (which has been in the argument for the plaintiff treated as if it had been signed previously to the signing of the written contract between the vendor and purchaser, but which in fact was signed several days afterwards) recognizes a *sale*; but this sale being *of land*, the receipt therefore also recognizes a *contract in writing*. Therefore

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Sir J. Scarlett, and W. H. W.

It was not necessary to produce
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which the deposit was

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Rule absolute for a new

Edwards v. Hodding,
101 Mass. 815; 1 Marshall, 377.

(b) This rule would be of little
or no advantage to the defendant,
as before a second trial the plain-
tiff would have the opportunity of
procuring the contract to be stamp-
ed. If the defendant, instead of
resting satisfied with the leave re-
served to him, to move to enter

a nonsuit, had de-
clined the evidence, or had
brought in a bill of exceptions, or
if he had defeated the
motion, and obtained
a new trial, the rule
would have been the
same. (The rule to enter a non-
suit is not made absolute,) but
the action would proba-
bly be altogether barred.

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this alone would have been conclusive to shew that a written contract had already been entered into. Without looking at the distinction of the terms upon which the receipt was given, and those upon which the agreement was signed, it is quite clear that the money was paid upon a *sale*; therefore, whenever the contract was entered into between the parties, whether before, contemporaneously, or even afterwards, the liability of the defendant to return the money (*a*) would not arise until the vendor had failed to perform the terms of the *contract of sale*. If the defendant be a stakeholder, he must hold on certain conditions. His liability to retain for the vendor, or to return to the purchaser, must necessarily depend upon the contract between the vendor and the purchaser; *their* contract, therefore, becomes a part of *his* contract.

The COURT took time to consider, and on a subsequent day in the term pronounced a

Rule absolute for a *new trial* (*b*).

(*a*) Vide *Edwards v. Hodding*, 5 Taunt. 815; 1 Marshall, 377.

(*b*) This rule would be of little or no advantage to the defendant, as before a second trial the plaintiff would have the opportunity of procuring the contract to be stamped. If the defendant, instead of resting satisfied with the leave reserved to him, to move to enter

a nonsuit, had demurred upon the evidence, or had tendered a bill of exceptions, not only would he have defeated the *present* action, and obtained his costs, (as would have been the case if the rule to enter a nonsuit had been made absolute,) but the *right* of action would probably have been altogether barred.



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The KING v. EDWARD, Archbishop of York, JOHN WRIGHT,
WILLIAM BOWERBANK, Clerk, and JOSEPH ROLLING
UNWIN, Clerk.


QUARE impedit to recover the presentation to the rectory of Langar, in the county of Nottingham, alleged to be forfeited to the Crown by reason of simony. The declaration contained one count, charging a simoniacal contract between *Wright*, the patron of the advowson, *Bowerbank*, the patron of the next turn, and *Unwin*, the presentee; by which *Unwin* was to grant a lease of land worth 600*l.* per annum, parcel of the rectory, for 170*l.* per annum, for ninety-nine years, if *Unwin* should so long live and continue incumbent. The declaration was delivered in May last, and the issue was made up and delivered, and notice of trial given for the summer assizes for Nottinghamshire. The cause was there entered for trial, and the record was subsequently withdrawn. On the 17th February, 1834, *Littledale, J.*, made an order that the plaintiff should have leave to amend the issue by adding the following counts:— First, a count stating the contract to be between *Bowerbank* and *Unwin* only, but with the *privity* of *Wright*: 2dly, The like, stating the contract to be between the defendants *Bowerbank* and *Unwin*, simply: 3dly, A count stating the simony to consist in *Unwin*'s agreeing to take 100*l.* per annum only from *Bowerbank*, for the profits of the benefice: and 4thly, A count stating that *Bowerbank* took a resignation bond from *Unwin*; and that the defendants should have until the tenth day of Easter term to plead *de novo*, in case they should be so advised.

White, for the defendant, *Wright*, on the day named, obtained a rule to shew cause why the order should not be rescinded, on the ground that the amendment ought not to have been allowed, or that the liberty to amend should only, at all events, have been granted on payment of all the costs previously incurred.

The decision of a judge at chambers as to amendments of pleadings within the limits of his discretionary power over such amendments, will not be interfered with by the Court, *semble*.

In quare impedit by the Crown, upon an alleged forfeiture by simony between the patron in fee, the grantee of the turn, and the incumbent, a judge at chambers has authority to allow an amendment, by adding counts varying the terms and the parties to the simoniacal contract.

And it is in the discretion of such judge to allow the amendment without making the prosecutor pay the costs previously incurred.

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M. D. Hill now shewed cause. The judge having allowed the amendment to be made, the Court cannot now entertain the question as to the propriety of that which has been done. [*Littledale, J.* It appears to us that it is open to the defendants to discuss the propriety of the allowance of the amendment.] In *The Attorney-General v. Henderson (a)*, the solicitor-general moved for leave to amend the information by adding another count; and upon inquiry the practice was found to be that the attorney-general may at any time amend, as a matter of course; and the Court therefore granted the motion. [Lord Denman, C. J. Is not requesting a count to be added, and so in fact filing new information?] The king is not bound by the answer. The additional counts were objected to upon the argument before the order was made, because they disclosed new causes of action. The answer given by the learned judge who made the order was, that they merely varied the statement of the original cause of action. The amendment only goes thus far. In the first or original count the simoniacal contract is charged as made between all parties: in the second it is laid as a contract between *Bowerbank* and *Unwin*, with the privity of *Wright*: in the third as a contract between *Bowerbank* and *Unwin* only: in the fourth and fifth as a contract between *Bowerbank* and *Unwin*. These contracts are of a secret nature, and if several counts are not permitted to be inserted in the declaration, there will frequently be a failure of justice. No new simony or new offence is charged in the additional counts. It was objected, when the rule was moved for, that the counts were improperly joined (b). If that be so, the defendants

(a) 3 Anstr. 714.

(b) The objection appears to have been, that the new counts, or at least the three last of them, charged an offence against two of the defendants only, whereas the original count implicated all three. If the

defendants had demurred on this ground, the answer would probably have been, that though two of the defendants only might have concurred in the act which caused the lapse to the Crown, the cause of action was the disturbance of

may demur. The simoniacal contract being stated with reference to *one presentation*, the plaintiff is at liberty to state the *terms* of *that one* contract in a variety of ways,

With respect to the costs. The Crown has a right to amend. Nothing is asked by way of indulgence from the Court, and therefore there is no reason for the imposition of costs as a term of the amendment.

White, in support of the rule. This is in reality a *penal* action. It is made a possessory action only by virtue of the statute of *Elizabeth*, which made the corrupt contract an avoidance. This is not the action of the Crown, but of a private individual, who has obtained a presentation from the Crown, upon a supposed forfeiture. The cause went down for trial with one contract only stated in the declaration; it is therefore not unreasonable to require the plaintiff, when he wishes to amend, to pay the costs. In *The Attorney General v. Henderson* the Crown paid the costs of the amendment.

In each additional count a new cause of action is stated. The first count states the contract to be between the three: the second count as a contract between *Bowerbank* and *Unwin*, with the privity of *Wright*. If this is a contract with *Wright*, it was unnecessary to insert it; but if it is not a contract with *Wright*, it is a different contract from that stated in the first count. In the third count a different contract is also stated. [*Patteson*, J. It will not be disputed that different *contracts* are stated; but that does not make the *causes of action* different. How do you make out that a new cause of action is stated? The same thing can only be recovered under each count.] If an action were brought for goods sold and delivered, it would not be permitted to add a count for work and labour. In

the Crown's right to present, in whatever manner that right may have accrued; and that each of the defendants, by omitting to plead "*ne disturba pas*," admitted himself to be a co-disturber.

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Wright v. Ager (a), which was an action to recover penalties from a sheriff's officer for extortion, the Court refused to allow the declaration to be amended by inserting additional counts.

LORD DENMAN, C. J.—An application in this case was made to a learned judge to grant an indulgence, which was conceded. The Court have scarcely, in my opinion, authority to interfere. But, supposing that they have, the judge has, I think, done quite right.

PATTESON, J.—I agree with every thing which was done by the learned judge. It is admitted that the judge had a discretion; and I protest against the doctrine that the exercise of that discretion is to be interfered with by this Court.

LITLEDALE, J. and WILLIAMS, J. concurred.

Rule discharged (b).

(a) 5 B. Moore, 330.

having resigned without pleading

(b) The presentee of the Crown was afterwards admitted, *Unwin*

to the amended declaration.

CREW and another, Executors of NEWTON, v. PETIT and others.

A. and B. sign a formal promissory note, by which they promise, "as churchwardens and overseers,"

The payment of interest on such note from time to time, by the vestry, is a sufficient acknowledgment of the debt to take the case out of the statute of limitations. A fortiori, where B. has audited the parish accounts, in which payments of interest on the note are entered.

ASSUMPSIT on three promissory notes of 50*l.* each, dated in 1813, and payable respectively in two, three, and four years after date. Plea: the general issue, and the "as churchwardens and overseers," to pay to C. or order a sum of money, with interest; which sum was in fact the amount of a loan made by C. for the use of the parish. A. and B. are personally liable upon such note.

statute of limitations. At the trial before *Denman*, C. J. at the Middlesex sittings after Trinity term, 1833, the following facts appeared :—

3d May, 1813, at a vestry held in and for the parish of Chingford, in Essex, of which the defendants were then churchwardens and overseers, the parish being in want of the means of furnishing the workhouse, Mr. *Henry Newton*, who was present at the meeting, agreed to lend the parish 200*l.* for that purpose, on receiving promissory notes for the amount, to be signed by the churchwardens and overseers. An order was accordingly made by the vestry, requiring the churchwardens and overseers to borrow the 200*l.* of Mr. *Newton*, to pay him legal interest, and pay him off 50*l.* a year until the whole was repaid. The defendants accordingly gave four promissory notes for 50*l.* each, with interest, payable one, two, three, and four years after date, which notes were in the ordinary form, except that they were signed by the defendants *as churchwardens and overseers*. One of these notes had been paid off. *Henry Newton*, during his lifetime, and his brother, after his death, down to the year 1831, received the interest upon the three remaining notes from the churchwardens and overseers *for the time being*, and receipts, acknowledging the payment by the churchwardens and overseers of Chingford, were signed by *Henry Newton*, or his brother. In the years 1829 and 1830, one of the defendants audited the parish accounts for the preceding years, and signed indorsements as follows: “ We have examined the within account, and find it just and correct.” In each of these accounts there was an item for the interest paid to Mr. *Newton* on the notes in question. Upon this state of facts, *D. Pollock*, for the defendants, applied for a nonsuit, on two grounds :—1st. That the defendants were not *individually* liable; and secondly, that supposing them to have been individually liable, the plaintiff’s right to recover was barred by the statute of limitations; for, he contended, that the payment of in-

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terest by the parish officers for the time being was a payment by *strangers*, and could not take the case out of the statute as against the defendants. The Lord Chief Justice gave the defendants leave to move for a nonsuit upon both points, but directed the jury to find for the plaintiffs, if they thought that the defendants had adopted the payments of interest. Verdict for plaintiffs; damages 170*l*.

In last Michaelmas term *D. Pollock* moved for a nonsuit accordingly, and the Court refused to give him a rule upon the first point, but after taking time to consider, granted a rule upon the second.

F. Pollock and *Hutchinson* now shewed cause. The point to be determined here, being whether the case is or is not taken out of the statute *by the payment of interest*, Lord *Tenterden's* act is entirely out of the question. Treating the defendants as sureties only, which is putting the case most strongly for them, the payment of interest by the parish takes the case out of the statute as against them. Suppose a banker requires a security for the loan of money to his customer, and the customer gets the money upon his surety's giving his own notes for the payment of the principal and interest, and that the party to whom the money is advanced regularly pays the interest,—could the surety, at the end of six years, refuse to pay the banker the amount for which he had given his notes? Surely not. The interest is there paid by the party who really ought to pay, and is pro tanto a discharge of the liability of the surety. But that is *not* the present case. Here, the defendants were themselves the persons who really borrowed the money on behalf of the parish, and the payments by the parish must be considered as payments by the agents of the defendants. It might be contended, that even without evidence of the adoption, by auditing the accounts, the payments of interest ought to be treated as payments by the defendants, for they are payments *for the benefit* of the parties to the notes, so

as to discharge them from all liability to pay such accruing interest. The adoption, however, by the auditing of the accounts on two successive years, and passing the items for the amount of interest paid to the holder of the notes, is conclusive. The auditing in 1829, by the one defendant, was notice that the notes were unpaid, and that the interest on them was in the course of being paid for his benefit; and supposing him to have been taken by surprise the first year so that it could not fairly be considered as such notice, the auditing a *second* time, with the absence of any objection on *either* occasion, is conclusive evidence of adoption by him, and therefore conclusive against his co-defendants. It is very probable that this defendant thought that he was not *liable* after he had ceased to be overseer, but this was a mistake in law, as the Court have decided, by refusing to grant a rule upon that objection.

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D. Pollock, contra. In order to see whether the statute has barred the plaintiff's right, it is necessary to revert to the original transactions. The notes were given in the character of churchwardens, &c. in pursuance of a resolution of the vestry, (made in the presence of Mr. *Newton*), that the churchwardens, &c. should borrow of Mr. *Newton* 200*l.* and pay him legal interest, and should pay him off 50*l.* a year until the whole was repaid. If the churchwardens, &c. were individually liable, the payment of interest by the parish was an unwarranted interference, which could not bind these parties. If the defendants were liable only as sureties, they should have had notice of the non-payment of the notes, according to their tenor. The party's signature at the foot of the parish accounts was never intended as an adoption of this particular payment, as it affects his own interest; such an effect was never contemplated. The payment, to be valid as against the defendants, ought to have been made with their knowledge and privity; and it is not sufficient that it merely resulted to their benefit. [*Patteson, J.* According to what you say about the notes

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being given by the overseers as sureties, you would make the notes mere pieces of waste paper. You say that the parties only contemplated the notes as memoranda, and yet they are drawn up in the form of promissory notes, and stamped. Lord *Denman*, C. J. Some of your observations go for a new trial, your rule was for a nonsuit only.]

LITLEDALE, J.—I think that the defendants are not entitled to a nonsuit. There is no doubt that the period of limitation is gone by; the only question is, whether any thing has occurred to take the case out of the statute. There was a payment of interest by the parish, and it was a question for the jury whether the defendants, or any of them, had adopted such payments. I think there is no reason to doubt upon the case. The parties to the note describe themselves as churchwardens and overseers, and by this they seem to me to recognize the vestry as *managers* of the business—to recognize the vestry as their *agents* for this purpose. If the case were to go to a new trial, the jury would, no doubt, find that the money was paid with the knowledge of the defendants, or one of them. Mr. *Pollock* says that there ought to have been *notice*; but it does not appear that the defendants were *sureties*. On the contrary, they appear on the notes to be *principals*; and if they sign as principals, they cannot be entitled to notice.

PATTESON, J.—The defendants are liable to pay the amount of these notes, for there was, I think, sufficient evidence to take the case out of the statute. It may be a hardship upon the defendants, but we cannot take from the plaintiff his right. The parish wanted to borrow money;—Mr. *Newton* lent it to the parish, whom he did not choose to trust, because they could not legally bind themselves. He therefore required the notes of their overseers. If it was intended that the defendants should not be individually liable, why do they give a regular promissory note, stamped? They cannot bind themselves *as overseers*, nor can they bind

the *parish*. But the designation of themselves as “churchwardens and overseers” has this effect,—of shewing that the parties, when they bound themselves, intended that the *parish* should have the management of the payment of the debt and interest. Within six years, there is evidence of one of the defendants having audited and signed the parish accounts, which contained an item for interest paid on these notes; and although it would be hard to say that by so doing a party admits the legality of all the items, yet, coupled with other circumstances, it is *evidence* of an adoption of the payment as just and correct. If one joint maker of a note pays interest upon the note, that is sufficient to take the case out of the statute as regards all the parties.

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WILLIAMS, J.—I am of the same opinion. If the payment was made by the authority and with the consent of any one of the defendants, it seems to be established that it takes the case out of the statute as against all.

Lord DENMAN, C. J.—It appeared to me to be a clear case. It really seemed to me that the parties must have been all along aware of the payment of interest. Some, if not all, were constantly residing in the parish, and therefore contributed a portion to the payment of the interest, and might always have seen what was being done.

Rule discharged.



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The KING v. HOWSE and THOMPSON.

Where error is brought on a conviction of felony, and after a four-day rule has been obtained and served on the attorney-general and prosecutor, there is no joinder in error, the party convicted is entitled to be discharged out of custody.

So in error upon a conviction for a misdemeanor.

THE defendants were brought up by habeas corpus. They had been tried and convicted at the Norwich Michaelmas sessions, before the Recorder there, upon an indictment which contained three counts: the first for a highway robbery, the second for an attempt to commit a felony, and the third for a common assault. The defendants brought error; and there being no joinder in error on behalf of the Crown,

Palmer now moved for judgment for the prisoners, for want of joinder in error. A four-day rule was obtained, and notice of the rule was duly given to the prosecutor and the attorney-general.

Lord DENMAN, C. J., after consulting with the officers of the Crown Office, said—It seems to be the constant practice of the Court, where there is a want of joinder in error in cases of *misdemeanor*, to discharge the prisoner. If there is any reason for the rule in cases of *misdemeanor*, it is stronger in cases of *felony*. The prisoners are therefore entitled to be discharged.

Judgment for the defendants.

PERRY v. GIBSON.

A witness who appears to produce a document, under a subpoena duces tecum, may be compelled

AT the trial of this cause before *Alderson*, J., at the last assizes for Cumberland, a witness who appeared under a subpoena duces tecum, to produce a document on behalf of the plaintiff, was allowed by the learned judge to produce to produce it without being sworn.

it without having been previously sworn. A verdict having been found for the plaintiff,

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F. Pollock now moved for a new trial, on the ground that the party should have been sworn, so as to give the defendant's counsel an opportunity of cross-examining him. He admitted that, in a case of *Evans v. Moseley* (a), the question whether or not a party, who appeared under a *subpoena duces tecum*, might be compelled to produce the document without being sworn, had been lately raised before a single judge in the Exchequer, and had been decided by him in the negative; and that therefore, if this Court should think it right to abide by that decision, he could not support his motion.

Talfourd, Serjt., stated to the Court that he had been in the case of *Evans v. Moseley*, and had moved for a new trial on the ground now taken by Mr. *Pollock*, before *Bayley*, B., who, after taking time to consider, had decided that the witness need not be sworn (b).

LORD DENMAN, C. J.—I think we had much better not disturb this question now that it has been settled in another Court.

PARKE, J.—I have always thought that the rule was as it has been decided in the case referred to.

LITLEDALE, J. and PATTESON, J. concurred.

Rule refused.

(a) 2 Dowl. Prac. Cas. 366.

(b) *Bayley*, B. stated in his judgment, that he had consulted

with the other judges of the Court, and that they coincided with him in opinion.



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BIGGS v. CLAY.

In an action for a malicious arrest on a charge of felony, it is not necessary for the plaintiff to give in evidence the whole of the proceedings before the magistrates.

CASE for maliciously causing the plaintiff to be arrested on a charge of felony without probable cause. Plea: the general issue. At the trial before *Gaselee*, J., at the last assizes for the county of Essex, it appeared that in the early part of last year a fire had taken place near Colchester, by which the defendant's house was consumed. The defendant applied to the magistrates for a warrant against the plaintiff, who had been engaged in carrying away materials after the fire, charging him with stealing a pump-handle. The defendant obtained a warrant to apprehend the plaintiff, and to search his house. Under this warrant the defendant searched the plaintiff's house, where he found the pump handle, the plaintiff's wife and son being at the time upon the premises. Before the constables and the defendant had left the house the plaintiff returned to it, on which he was immediately taken into custody, and brought before the magistrates, who, after hearing the statements and evidence of the parties, discharged him. No evidence of what occurred before the magistrates previous to the discharge was given. The defendant's counsel contended at the trial that it was incumbent on the plaintiff to prove all that occurred before the magistrates; that it was not sufficient to shew the arrest and discharge. The learned judge was of opinion that it was not necessary to prove *all* that occurred, and a verdict was found for the plaintiff.

Platt now moved for a new trial, on the ground that it was necessary to prove *all* the proceedings before the magistrates.

By the COURT—We think it is not necessary.

Rule refused.

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JONES v. REYNOLDS.

IN an action for rent reserved upon a demise of certain ores under certain land in Glamorganshire, the defendant, after plea and before trial, filed a bill in Chancery against the plaintiff, praying for relief against the agreement upon which this action was brought, and obtained an injunction to restrain the plaintiff from proceeding in the action. Pending the injunction, the defendant withdrew his pleas, and signed a cognovit for 750*l.* and costs, in which it was stipulated as follows: "No judgment shall be entered up hereupon, or execution issued, until after the final hearing of a certain Chancery suit instituted by the defendant against the plaintiff to be relieved from the cognovit on which this action is brought, and the *final decree or order* to be pronounced hereon; when, in the event of the final decree or order being in favour of the plaintiff, judgment shall be entered up hereupon and execution issued, and the same shall operate in accordance with such decree or order. And it is hereby expressly agreed, that upon such decree or order being made in favour of the plaintiff in this action, the plaintiff shall be at liberty to levy upon such execution for such sum or sums of money only as by the said decree or order the defendant shall be directed to pay." The suit in Chancery was heard, in December last, before Sir John Leach, M. R., who on the 10th of January dismissed the bill with costs. In February, the defendant appealed to the Lord Chancellor. In March, the plaintiff entered up judgment upon the cognovit. Thereupon an order was made by Parke, J., for staying the proceedings until the fifth day of this term, to enable the defendant to apply to this Court to set aside the judgment for irregularity. Follett at the commencement of the term obtained a rule accordingly, against which,

Where in a cognovit it is stipulated that judgment shall not be entered up until after the *final hearing* of a Chancery suit, and the *final decree or order* thereupon, when, in the event of the final decree or order being in favour of the plaintiff, the judgment and execution upon the cognovit are to operate in accordance with the decree or order, and the plaintiff is to be entitled to levy for the amount decreed, and no more; the plaintiff is not authorized to enter up judgment, pending an appeal to the Lord Chancellor, against a *final* decree at the Rolls dismissing the defendant's bill.

Whitcombe, at the close of the term, shewed cause. The

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question is, whether there has not already been, within the terms of this cognovit, a *final hearing* of the Chancery suit and a final decree or order pronounced thereon. There has been a *final decree or order*, as contra-distinguished from *interlocutory* decrees and orders, and this is the distinction contemplated by the cognovit. If the plaintiff is to wait till the suit is finally settled *upon appeal*, the cognovit will be almost useless, and, indeed, it is apprehended that a decree upon appeal is but an *order* of affirmance or reversal. [Lord Denman, C. J. The cognovit says, final decree or order.] The terms are used synonymously. [Follett. There is another objection, which is, that the levy is to be only for the sum *finally* decreed.] The plaintiff will issue execution to no greater amount at his own peril.

Follett, contra, was stopped by the Court.

LORD DENMAN, C. J.—We think that the judgment cannot be entered up until the *final determination* of the Chancery suit.

LITLEDALE, J.—I quite agree. The question does not turn upon the technical meaning of the words “decree or order.” What is meant is, the final settlement of the suit.

PATTESON, J., and WILLIAMS, J., concurred.

Rule discharged.



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KNIGHT v. GIBBS.

CASE for words spoken by the defendant in conversations had with one *Hannah Enock*, and with others, imputing want of chastity and gross levity of conduct to the plaintiff, as lodger in the house of the said *Hannah Enock*; alleging as special damage, that the plaintiff, who was at the time of speaking these words in the service and employ of one *Samuel Enock*, was turned out of such employ and prevented from earning the gains to which she would otherwise have been entitled. Plea, the general issue.

At the trial before *Patteson, J.*, at the last Worcester-shire spring assizes, Mrs. *Enock* proved the words (a), and that at the time when they were spoken, the plaintiff was employed by her in the business, which *she* conducted, of a straw-bonnet maker, and lived with her in the house, which her husband held as tenant to the defendant; she also proved that she had since dismissed the plaintiff *in consequence of what the defendant had said*; but upon cross-examination, it was admitted by her that she did not dismiss the plaintiff because she *believed* the words to be true, but because she *feared to offend the defendant*, her landlord. Serjt. *Talfourd*, for the defendant, applied for a nonsuit, on the ground that the special damage proved did not flow from the slander as such, but from another cause operating upon the witness's mind. The learned judge refused to nonsuit, but gave leave to move the Court for a nonsuit upon the point. The case then went to the jury, and Serjt. *Talfourd* contended, in the course of his address to them, that the relation of landlord *entitled* the defendant to make a representation to his tenant on the subject of the

In order to support an action for defamatory words actionable only in respect of special damage, it is not necessary that the person whose act constitutes the special damage should have *believed* the defamatory charge, provided that he acted *in consequence* of the words having been spoken.

A defamatory communication by *A.* to *B.* respecting the inmates of the house occupied by *B.* as his tenant, is privileged, when such communication is made *bonâ fide* in consequence of the relation of landlord and tenant, and without malice in fact.

(a) The words, as proved, related to the plaintiff and another woman also lodging with Mrs. *Enock*, and in her employ, and were to the following effect:—"Their conduct is shameful and disgraceful, so that

they make the house more like a bawdy-house than any thing else—I shall be giving you notice. It is a disgrace for any one to have such persons in his house."

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conduct of persons lodging with her, for that he was interested in the reputation of the house, and that therefore the communication was privileged; and that no special damage had been proved to have been occasioned by the slander. Upon the first point, the learned judge appears to have stated to the jury, that if they thought that the communication was made *bonâ fide*, with reference to the relation of landlord and tenant, and without any intention to do a malicious injury, the communication was privileged, but not otherwise; and upon the second point, his lordship left it to the jury to say whether they believed that the witnesses had, in dismissing the plaintiff, acted *in consequence* of the speaking of the words by the defendant. The jury found for the plaintiff, damages 10*l*.

Second point:
Damage not
occasioned by
belief of the
defamatory
words.

Talfourd, Serjt., now moved for a nonsuit or for a new trial. The special damage which must be shewn, in order to support a declaration for slanderous words not actionable of themselves, must *flow from the words, as slander*. [*Parke*, J. If these words had not been spoken, Mrs. *Enock* would not have dismissed the plaintiff.] It is not enough that the damage flows *from the words*, unless it flows from them *as slander*. In *Vicars v. Wilcocks* (a) it was held, that the special damage must be the legal and natural consequence of the words spoken. Here, the damage was not in reality a consequence of the words spoken; for Mrs. *Enock* stated that she discharged the plaintiff upon other considerations than that of a belief in the truth of the words.

First point:
Privileged
communication.

Upon the other point, as to whether the relation of landlord and tenant made the communication privileged, the learned judge, it is believed, told the jury that the defendant was not entitled to protect himself under his character of landlord. [*Patteson*, J. I do not see how it could be put otherwise than thus;—that if the jury thought that the defendant made the communication *bonâ fide* and without an *intention to do a malicious injury*, it would be privi-

(a) 8 East, 1.

leged, but not otherwise. I suppose, however, that I did not put it so, if you say that I did not. Certainly the words proved were very strong, and such as, I think, could hardly, in point of fact, be put as a privileged communication on the part of the landlord.]

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Lord DENMAN, C. J.—The case and argument have been very fairly stated. It is most likely that my brother *Patteson* *did* put the case to the jury, as he now thinks he *should* have done. If he had directed the jury that the landlord's communications were not privileged, as a point of law, I think that you would have been entitled to your rule for a new trial. If it had been a communication by the landlord made *bonâ fide*, I should think that it was privileged. The proper question was,—whether the communication was made *bonâ fide*? and I should have thought the learned judge wrong, if the case had been otherwise left by him to the jury. First point.

Upon the other point, as to whether the special damage can be considered as resulting from the slander, I think that the circumstance of the witness stating that she did not discharge the plaintiff because she *believed* the words to be true, but because she *feared to offend the defendant*, ought not to deprive the plaintiff of her right of action. We ought not, I think, to speculate too finely upon the *motives* that operated upon the person whose act is relied upon as constituting the special damage. The real question is, whether the damage was produced *by the words having been spoken* by the party. I do not know that the *belief* of the charge is at all material. I may not *believe* a charge, and yet I may not have the courage to keep a person who is suspected by others. I think it better that we should lay it down generally that if the words are *slandrous* and are *acted upon* to the prejudice of the party slandered, an action may be maintained. Second point.

PARKE, J.—I think the verdict ought not to be disturbed.

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First point.

Upon the question, as to whether the communication was privileged, I think that if it had been distinctly made out that the judge had said that the relation of landlord did not justify *any* communication, which would have been actionable in an ordinary case, I should have said that the defendant was entitled to a new trial; because I cannot say that he *might* not make such communication. The conduct of which a landlord complains might be such as would render his house liable to be treated as a disorderly house. The proper question is, whether the communication is made *maliciously*. The language here was very strong, and there did not appear to be any facts to justify it; so that it is very probable that the jury would find malice if it were put to them. There must, I think, be no new trial.

Second point.

The point upon the motion for a *nonsuit* is, whether the special damage *flows from* the slander. It appears to me that it does. It does not appear clearly that the plaintiff would have been turned away, but for the words, although it appears that she would probably have been discharged in the same manner if other words had been used; but still it appears that she was turned away in consequence of the words. This case differs from *Vicars v. Wilcocks* (a), supposing that to have been rightly decided. There the loss of employment to the defendant was *partly* owing to the words used, and *partly* in consequence of the plaintiff's having been discharged by his former master. Therefore the special damage was only *in part* owing to the expressions of the defendant. Here, it is wholly occasioned by the words; although it appeared that other words might have had the same effect.

First point.

PATTESON, J.—I do not recollect how the case was put upon the first point. My brother *Talfourd* did not put it as a question of law and ask for a nonsuit, or I should have had a note, as I have of the second point. If I stated it one way I was wrong; if the other way, I was right. Upon the whole of the evidence, the language used cer-

(a) 8 East, 1.

tainly appeared not to be warranted by the facts. Therefore if a jury were told that the defendant was only liable, if they thought he had acted from malicious feelings, they would have found for the plaintiff.

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With respect to the other point, I would not nonsuit, because there were no cases to shew that I ought to do so, *Vicars v. Wilcocks* differs from this case, for the reasons which have been already stated. Here, the damage follows *entirely* from the defendant's conduct. He slanders the plaintiff, and follows up what he says, by requiring Mrs. *Enock* to act upon what he has said by turning the plaintiff away. That is the effect of what he says, and she does what he requires. Therefore I think that the damage *flows naturally from the words*.

Second point.

Rule refused.

MANSFIELD v. BREAREY.

ASSUMPSIT on an agreement, by which the defendant undertook, for commission and reward, to endeavour to sell a turnip cutter for 4*l.*, and to return it in the event of his being unable to procure 4*l.* for it: Breach, that he sold it for less than 4*l.* to wit, 1*l.* 11*s.* There were also a count for goods sold and delivered, and the common money counts, the 7th count being for money received by the defendant for the plaintiff's use. Plea: the general issue. At the trial before the under-sheriff of the county of Derby, by virtue of a writ of trial, evidence was given on the part of the plaintiff, in support of the special contract stated in the special count, and it was shewn that the defendant had sold the instrument by public auction for 1*l.* 11*s.*, which sum he had never paid to the plaintiff. Evidence was given on the part of the defendant tending to shew that he had been authorized by the plaintiff to use his own discretion in selling, and that 1*l.* 11*s.* was the full value of the instrument. It was suggested on the roll, that the action was brought for a debt not amounting to 40*s.*, in order to deprive the plaintiff of costs under the provisions of a Court of Requests' Act. The Court are bound by the record as returned by the under-sheriff.

On the trial of an action upon a special contract with the money counts, evidence is given of a special contract, but the jury find a *general* verdict for 31*s.* being the precise amount which the plaintiff would have been entitled to recover under the count for money had and received, the defendant is not entitled to the entry of the suggestion on the roll, that

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was also shewn that at the times when the cause of action arose and when the action was commenced, the defendant was within the jurisdiction of the Derby Court of Requests. The defendant contended upon the evidence, that the plaintiff was only entitled to recover the sum which the defendant *had received*, and that, therefore, the claim was within the provisions of an act of 6 Geo. 3, c. 20, "for the more easy and speedy recovery of small debts within the borough of Derby and the liberties thereof," by which a court of requests was created, and by which it was provided that no *action* at law should be brought for the recovery of "any *debt*" not amounting to 40s. against any inhabitant within the borough and liberties. The jury found a verdict for 1*l.* 10*s.* (a). The under-sheriff entered the finding of the jury upon the postea as a finding upon the 7th count only, and whilst it was in this form caused a copy to be given to the defendant. Afterwards the plaintiff's attorney applied to the under-sheriff to alter the postea, by entering the verdict upon the declaration generally. The under-sheriff refused to do so at first, although he admitted that the verdict, as given by the jury, was a general one; but afterwards said that he was about to go to London, and would take the opinion of his pleader as to the propriety of making the alteration, and that he would act accordingly. The alteration was subsequently made, and in the postea as returned with the writ of trial, the verdict appeared to be general. The under-sheriff certified that the judgment ought not to be signed until the defendant had had an opportunity of applying to this Court for relief under and by virtue of the act of 6 Geo. 3, c. 20. *Whitehurst*, in Easter term, obtained a rule to shew cause why the verdict should not be

(a) The under-sheriff's notes of the evidence, verified by affidavit, were before the Court.

In a case of *Burney v. Moxal*, which had been tried before the Mayor and Bailiffs of Liverpool, pursuant to an order from this

Court, *Alexander*, in the course of this term, moved for a new trial, on the ground that the verdict was a perverse verdict. The Court refused the rule, because the notes of the presiding judge, *verified by affidavit*, were not in Court.

set aside and a verdict entered for the defendant, or a nonsuit entered, or why the verdict for the defendant should not be entered on the common counts only, and a suggestion entered on the issue roll, of the fact of the verdict, and that the defendant was liable to be summoned before the commissioners of the court of requests established by 6 Geo. 3, c. xx, for the sum recovered, and awarding to the defendant his costs of defence of this application, and of entering the suggestion on the roll.

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Busby now shewed cause. The Derby Court of Requests Act only applies to cases where the claim is for a *debt* under 40s., and does not extend to the case of an action for unliquidated damages, in which the damages recovered are under 40s.; *Jonas v. Greening* (a). In this case there were special counts and evidence given to support them, and although the jury returned their verdict for the *amount* which the defendant had received for the plaintiff, it does not necessarily follow that the verdict was not upon the special counts. The contest before the under-sheriff was, in fact, whether the plaintiff could have got more than the sum for which the machine had been sold, and the jury may have thought that he could not, and that therefore though the special contract was broken, the plaintiff had suffered no damage in respect of the mere breach. The mere finding of a verdict for 1*l.* 11s. does not negative the special contract. The verdict was general in fact, and is so entered upon the postea, and therefore the verdict must apply as well to the special as to the common counts.

Whitehurst, in support of the rule. In the report of *Jonas v. Greening*, it does not appear that the declaration contained any of the common counts, and it is quite clear that the money recovered in that case could not have been recovered upon any *but* a special count. Here, there was only

(a) 5 T. R. 529.

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one cause of action, and that was a debt under 40s., and the finding was, in fact, although not in express terms, a finding upon the common counts only. [*Littledale, J.* You should apply to the judge(a) to amend the postea, if it is incorrect (b). Lord Denman, C. J. We must take the finding to have been as it is stated in the postea.] The judge has referred the defendant to the court by an indorsement upon the postea. It is submitted that the under-sheriff had no right to alter the postea as he has done; but even if he had such a right, still as he referred the whole matter to this Court, it is hoped that the Court will be of opinion that the verdict ought to be upon the 7th count only. The jury gave the plaintiff the exact amount for which the machine was sold, which in the understanding of every person must mean that they negatived the special contract. The Court of Requests' Act was given in evidence at the trial, and was a good defence to the action under the general issue. *Parker v. Elding* (c), *Barney v. Tubb* (d), *Taylor v. Blair* (e).

Lord DENMAN, C. J.—The question whether the rule was properly obtained and ought to be made absolute, depends upon the question, whether the action was for a debt under 40s. It is quite clear that the action is for a debt within the meaning of the act, but it is also for something more. There was a special contract stated in the declaration, and it is very possible that the jury may have thought

(a) i. e. the sheriff's "deputy or judge," before whom the cause was tried, by virtue of 3 & 4 W. 4, c. 42, s. 17. The Courts use the same language in speaking of the person before whom a cause is tried, whether he is one of the judges of the superior Courts sitting under a writ of nisi prius, or an under-sheriff sitting under a writ of trial.

(b) The power of amending the

postea, though vested in the Court out of which the nisi prius record issues, and to which it is returned with the postea indorsed, is generally, for the sake of convenience, exercised by the judge, who having tried the cause, is in possession of the materials from which the amendment is framed.

(c) 1 East, 352.

(d) 2 H. Bla. 350.

(e) 3 T. R. 452.

the special contract broken, and have also thought that the plaintiff had not sustained any damage in respect of the breach. We cannot speculate upon what passed in the minds of the jury, nor can we enter into that which is stated to have taken place with the under-sheriff with respect to the alteration of the postea, but we must take the postea as we find it. From that it appears that the verdict was for a debt and *also* for the breach of a special contract, and therefore the case is not within the act.

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LITLEDALE, J.—There is a special contract in the declaration, and evidence given in support of the claim made in it. We cannot say that the jury meant to find only for money had and received.

WILLIAMS, J.—I am of the same opinion. The cases which have been quoted are very different from the present. Here there is a special count and a general verdict. There is no suggestion that the special count was introduced by contrivance in order to evade the provisions of the Court of Requests' Act. In the evidence there was enough to shew that the special count was *not* colourably introduced in order to take away the operation of the statute. I think that this case does not come within the act, and therefore that the rule ought to be discharged.

Rule discharged.

—◆—
 REX v. BIERs and another.

INDICTMENT for a conspiracy. The first count charged that the defendants, well knowing that one A. B. was the proprietor of a certain licensed stage-carriage, and that he, *Where an indictment for conspiring to lay an information for an offence contrary to a certain act, knowing that the offence had not been committed, the act is mentioned as an act passed in the second and third years of the reign, &c., the judgment was arrested. An act passed in a session extending into two years of a reign, may, in pleading, be described as an act passed in a session holden in the two years.*

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as such proprietor, was liable to the payment of certain penalties, in which the driver of such carriage (the name of such driver not being known) should be convicted before any justice of the peace for any offence committed by such driver "against a certain act of parliament made and passed in the second and third years of the reign of his present majesty, intituled," &c., did conspire &c., falsely &c., and without any probable cause, to exhibit an information against *A. B.*, as such proprietor of the said stage-carriage, before a justice of the peace, charging, that *A. B.* was the proprietor of a certain licensed stage-carriage, and that the driver was unknown, and that when the said driver drove the said carriage, he unlawfully carried two persons on the box besides the driver, the same being contrary to the form of the statute in such case made and provided, whereby the driver had forfeited the sum of 5*l.*, to be applied as the law directs. The count then set out the overt acts.

The other counts of the indictment may, for the purposes of the question that arose upon the following motion, be considered as precisely similar.

The indictment, being removed into the Court of King's Bench by *certiorari*, was tried before *Denman*, C. J., at the sittings after last Hilary term, when the defendants were found guilty.

Adolphus moved in arrest of judgment. There is in this indictment a bad description of an act of parliament, for an act is described as made and passed in *the second and third years* of the present reign. In *Bacon's Abridgment* it is laid down, that an act of parliament cannot be properly described as of two years in any reign. Mr. *Addington's Act* (a) enacts, that a statute shall be deemed to take effect from the day on which it receives the royal assent. In *Nutt v. Stedman* (b), it was held, that an act described as the 8th & 9th Will. 3, was wrongly described, and that the description should have been as of the eighth year,

(a) 33 Geo. 3, c. 13.

(b) Fortescue, 572.

being the year in which the session began. This principle is recognized in *Rumsey v. Tuffnell* (a).

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Sir *James Scarlett* shewed cause, in the first instance. If the words are absurd, they may be rejected without impeaching the validity of the indictment. Whatever the Court might have done, if the legislature had declared no opinion on the subject, is not now the question; for this Court is bound to adopt the language of the legislature, and in an act of last year, relating to stage-coaches, this very statute is described as a statute passed in the 2d & 3d years of *Will. 4*. The prosecutor could not err in adopting the language of the legislature.

Follett, who was counsel for *Stapleton*. If the declarations of the legislature are to be taken, then there are *two* with respect to this act of parliament. In the schedule of the act there is a form of conviction, in which these words are employed "in pursuance of an act passed in the *third* year of *Will. 4*." [*Patteson, J.* Both these descriptions are informal. The true description is "an act passed in the session of 2 & 3 *Will. 4*." Instances of this are to be found in the Law Amendment Act (b), where the statute of 8 & 9 *Will. 3*, c. 11, is described (c) as an act passed in the session of parliament held in the 8 & 9 *Will. 3*, and the 5 & 6 *Edw. 6* is described (d) as an act passed in the session of parliament holden in the 5 & 6 *Edw. 6*.]

Adolphus, in reply. In *Bacon's Abridgment* (e) it is said, "If a party recite a statute, as made upon a certain day, which was not made on that day, he has, although the statute be a public statute, failed: for he does not refer to the knowledge of the judges, as he would have done, if he had said against the form of the statute in such case

(a) 9 B. Moore, 425.

(d) Sect. 42.

(b) 3 & 4 *Will. 4*, c. 42.

(e) *Title*, Statute L. 5.

(c) Sect. 16.

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made and provided. If he had said so, the law would have referred the pleading to such statute as had been appointed for it; but as he has recited a particular, if there be not such a statute, his pleading is grounded upon a thing which does not exist." [*Littledale*, J. Authorities upon this point are collected in *Viner's Abridgment* (a), and there is also a case of *Bryant v. Withers* (b). The result of these authorities is, that if you give the description of a statute, you must give it accurately.]

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—We are of opinion that the objection made to the indictment is fatal. In *Langley v. Haynes* (c), which was an action of debt, upon the 2nd *Edw.* 6, for not setting out tithes, the declaration recited that the statute was made the 2 Nov. anno 2 & 3 *Edw.* 6, and it was held, that there could not be one day in two years of the reign of the same king, and for this reason judgment was arrested. This is recognized in 2 *Hawkins* (d), Pl. Cr., and acted upon in *Nutt v. Stedman*. We feel we cannot get over the authority of these cases.

Judgment arrested (e).

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| (a) <i>Title</i> , Statute E. 3 and E. 5. | Cowp. 474; <i>Anon.</i> 2 Lord Ray- |
| (b) 2 M. & S. 123. | mond, 1224; <i>Birt qui tam v. Roth-</i> |
| (c) Moore, 302, pl. 452. | well, 1 Lord Raymond, 210; <i>Platt</i> |
| (d) 246, c. 25, s. 104. | <i>v. Hill</i> , <i>ibid.</i> 382. |
| (e) See <i>Rann</i> , clerk, v. <i>Green</i> , | |



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HAYSLIP and Wife v. GYMER.


DEBT for money had and received, and detain for bank notes. Pleas: Nil debet, and Non detinet. At the trial before *Denman*, C. J., at the London sittings after last Hilary term, the following facts appeared:—

The plaintiff, *Mrs. Hayslip*, had, when *Miss Emma Gymer*, lived for many years with an aunt of the name of *Wilkinson*, and in a great measure managed her household affairs. *Mrs. Wilkinson* died in March, 1833, having kept her bed about a week before her death, and having, two days after taking to her bed, entrusted *Miss E. Gymer* with the care of all her keys. *Miss E. Gymer*, on the same day, but before she had received the keys, shewed to her sister, who then came to the house, a parcel containing bank notes, which she said her aunt had given her. After the funeral of *Mrs. W.*, her will was read in the presence of the legatees, executors, and friends of the family of *Mrs. W.*; and after the reading of it was concluded, one of the executors asked if any one had any thing to say; upon which *Mr. Gymer* (the defendant, and brother to *Miss E. Gymer*), said to her, "*Emma* you have something which *Mrs. Wilkinson* gave you before her death." *Miss E. Gymer* then produced the parcel, which contained notes to the amount of £201.; and in answer to inquiries, stated that *Mrs. W.* had about a fortnight before her death, and before she took to her bed, privately given the parcel to her, saying that it would be of use to her after her (*Mrs. W.*'s.) death. The residuary legatee then objected to her retaining the notes, alleging that he did not consider it a legal gift. Upon this the defendant took up the parcel, and said (according to the plaintiff's witnesses) that he would keep the notes until his sister required them; or (as the witnesses for the defendant stated) until the title of the executors was determined upon.

reading of the will, of her having told her sister some days before the death of *A.*, of the gift having been made to her, and of the circumstance of other money of *A.*'s being untouched, although *B.* had had opportunities of possessing herself dishonestly of the notes, was sufficient evidence to go to the jury, upon a question raised whether *B.* was justly entitled to the notes.

Upon the reading of the will of *A.* in the presence of her family, *B.*, who had resided with her, produced a parcel containing bank notes, and stated that *A.* had given it to her about a fortnight before her death, upon which *C.*, the brother of *B.*, took up the notes, and said that he would keep them until *B.* required them, or, as stated by other witnesses, until the claims of the executors were disposed of: Held, that in an action by *B.* against *C.* for money had and received, evidence of what had been stated by *B.* was admissible to shew her title to the notes.

Held also, that such statement, coupled with the evidence of possession, of *B.*'s conduct at the time of

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It appeared that, after the death of *Mrs. Wilkinson*, about 140 sovereigns, which had been kept in the same box with the parcel, were found untouched. Some circumstances were also proved in evidence, on the part of the defendant, with a view to shew that it was improbable that *Mrs. Wilkinson* could have given the niece these notes in the manner which she had stated. *Sir J. Scarlett*, for the defendant, contended that the statement of *Mrs. Hayslip*, respecting the mode in which she had become possessed of the notes, was not receivable in evidence; and that there was not sufficient evidence for the case to go to the jury. The Lord Chief Justice over-ruled these objections, and left the case to the jury, who, while his lordship was addressing them, expressed themselves satisfied that the notes had been given to *Mrs. Hayslip* by *Mrs. Wilkinson*, and found a verdict for the plaintiffs.

Sir James Scarlett moved for a rule nisi for a new trial. First, the statement of *Mrs. Hayslip* was inadmissible in evidence on general principles. It is true that if a plaintiff, to prove his case, makes use of an admission of the *defendant*, contained in a conversation, the whole of the conversation is admissible in evidence. But in this case the plaintiff proved her own case by a statement made by *herself*. [*Parke, J.* The principle on which the conversation of a plaintiff is evidence is, that the defendant, by saying nothing, acquiesces in it. There is in this case the additional fact, that the plaintiff is in possession of the notes.] A party living in the house of the owner may have possession of the property without a gift.

Then if this gift is to be considered as a *donatio mortis causâ*, there was not sufficient evidence of it. The statement made by the testatrix, according to *Mrs. Hayslip's* account, that she would find them useful after her death, favours the notion that the testatrix intended this as a gift only in the event of her death. A *donatio mortis causâ* must be made in the last illness of the donor; it is liable

to the claim of creditors, and is subject to the legacy duty. It is almost in every respect similar to a bequest by a nuncupative will, except that it is necessary, in the case of a *donatio mortis causâ*, that there should be an actual transfer of the possession to the donee. The same evidence is required in both cases. In this case the testatrix is in a situation in which witnesses might at any time have been had, yet she never mentions the gift to any one. The statement of Mrs. *Hayslip* is corroborated by no other circumstance than possession, and it is proved that she had the *keys* of the house. The possession, therefore, does *not* corroborate her testimony. It cannot make any difference whether the statement was made to *A.* or *B.* It may make it receivable in evidence as part of the *res gesta*, but the statement does not derive any new quality from being made *to* any particular person. If this is admitted in evidence, it will be easy for the inmates of a house to plunder, and then to *state* that the property was *given* to them.

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Cur. adv. vult.

LITLEDALE, J., after stating the facts of the case, said—One question was, whether this was a *donatio mortis causâ*. If the gift was made in immediate *anticipation* of death, and upon condition to *return* it in the event of her recovery, it was a *donatio mortis causâ*; but there was no evidence of this.

There was, in my opinion, evidence to go to the jury as to the mode in which the bank notes were obtained. An application is made to Mrs. *Hayslip*, and she states in what way the notes were given to her. The evidence was *slight*; but as the plaintiff had the notes in her possession, there was *some* evidence from which the jury might conclude that the account given by her was correct.

PARKE, J.—Although the evidence was slight, yet I am of opinion that there was *some* evidence to go to the jury.

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There was evidence that the plaintiff's wife had the possession of the bank notes several days before the testatrix died, and that after the testatrix's death, when an inquiry was made, she immediately produced the notes, and gave an account of the mode in which she had become possessed of them. From the account she gave, she would be entitled to them either as a gift *inter vivos*, or as a *donatio mortis causa*. Either the one or the other would entitle her to them. The defendant did not *deny* what Mrs. *Hayslip* stated. It is not her *stating* the circumstance which makes it receivable in evidence, but the defendant's not denying it. It is true that it is an acquiescence in that of which the defendant has no personal knowledge; but still it is *some* evidence, though slight. Immediately after the statement had been made, there was, according to the plaintiff's witnesses, an express undertaking to return these notes on request; and by this undertaking the defendant would be bound, unless he could shew that the account given by the plaintiff's wife was untrue. If any other person had claimed them, he might have set up the *jus tertii*. On the part of the defendant it was said that he did not undertake to return them on request, but that he would keep them *until the claims to them were settled*. That would present a very different question. The jury, however, interrupted my Lord *Denman*, and decided the case before he came to that part of the evidence. The case therefore stands on the previous possession, accompanied with this circumstance, that there was other money in the house untouched; which tends to shew that Mrs. *H.* had not *helped herself*. There is also the circumstance that she did not keep back the property, but immediately produced it. There was therefore, I think, *some* evidence to go to the jury; and they appear to have been perfectly satisfied with the account which Mrs. *Hayslip* gave.

PATTESON, J.—The question was stated to be, whether what the plaintiff said was *admissible* in evidence. That

ould hardly be a question. It was rather, whether that
 idence was *entitled to any weight*. Generally speaking,
 plaintiff ought not to be allowed to give evidence of what
 he has himself said, in his own favour. But it is a very dif-
 ferent thing where the defendant is obliged to let in what
 the plaintiff said. In this case the plaintiff was entitled to
 give in evidence the circumstances under which the defend-
 ant received the money. Some one asked her a question
 immediately before he took the money. I do not see how
 it is possible to exclude her answer. The jury might take
 it into their consideration. The defendant did not *in terms*
 deny the statement, nor did he *in terms* acquiesce. His
 conduct therefore affords very trifling evidence; still it is
something to go to the jury.

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Lord DENMAN, C. J.—I am of the same opinion. The
 objection made was, that the case ought not to go to the
 jury. It was quite impossible to maintain that objection.
 The only part of the plaintiff's case which was contradicted
 was, the defendant's having said he would keep the notes
 until the plaintiff required them. Evidence of acquiescence
 from a person who does not know the facts, amounts to
 nothing; but when a man *asks* for an account from a per-
 son, who gives one, it is extremely reasonable and quite
 inevitable that the jury should give such weight to it as
 they in truth and justice think it deserves.

Rule refused.



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The KING v. The Lord of the Manor of OUNDLE.

A. surrenders a copyhold to such uses as *B.* shall appoint, and in default of and until appointment, to *B.* in fee: *B.* appoints to *C.* The lord is bound to admit *C.* without requiring the previous admission of *B.*

A Mandamus had issued (*a*) to *J. W. Russell*, esq. lord, and *H. M. Hewlett*, steward, of the manor of Oundle, in the county of Northampton, commanding them to admit *John Pruday* as tenant of the manor, to certain copyhold hereditaments. Upon a motion to quash the return for insufficiency, the Court directed it to be set down in the paper for argument.

The mandamus, after stating the existence of the manor, the mode of descent of the copyholds in the manor, and the right by custom of the customary tenants to be admitted thereto, alleged as follows:—

1809. *Ragsdell* was, on the surrender of a customary tenant, admitted tenant in fee simple, according to the custom of the manor, to certain copyhold hereditaments within the manor.

1830. *Ragsdell* surrendered the hereditaments to such uses, upon such trusts, and to and for such ends, intents, and purposes, and with, under, and subject to such powers, provisos, declarations, and agreements, as *Dawson* by any deed or deeds should direct or appoint, and in default of and until such direction or appointment, to the use and behoof of the said *Dawson*, his heirs and assigns, for ever.

1830. *Dawson*, in execution of the power, did by deed direct and appoint that the hereditaments should thenceforth remain and be to the only proper use and behoof of *Pruday*, his heirs and assigns, according to the custom of the said manor. *Pruday* applied to be admitted, but the lord refused to admit him.

The return stated that *Dawson* had not been admitted or claimed to be admitted to the hereditaments as tenant thereof, and that no surrender by *Ragsdell* or by *Dawson* to or for the use of *Pruday* had been presented or made known unto the lord or his steward, whereby *Pruday* could become entitled to be admitted.

(*a*) See the argument upon the rule for a mandamus, *ante*, vol. i. 586.

W. Hayes (with whom was *Platt*), for the crown. In support of the return it will be contended that *Dawson* is the person to be admitted tenant. That argument must tend to establish one of these three propositions. First, that the power was not well created: Secondly, that it was not well executed: Thirdly, that if well created, and well executed, yet that *Dawson*, the person on whom the use of the surrender had attached subject to the power, ought to be admitted in the first instance;—that although the use was overreached by the execution of the power, the cestui que use can still call upon the lord to admit him.

The first ground, namely, that the power was bad in its creation, as being a power to limit *by deed* the use of copyhold land, involves a question which has been elaborately discussed both here and elsewhere, *Boddington v. Abernethy* (a). [*Campbell*, A.G., who was of counsel for the defendants, here intimated that he did not mean to question the validity of such a power. He conceded that if *Dawson* had taken a mere power without any interest, his appointee might have claimed to be admitted.] This concession disposes of the first two points, and relieves the prosecutor from what has created the main difficulty in previous cases;—a difficulty which is not easily accounted for after the doctrine had been once settled,—that if a copyholder surrender to such uses as he shall by will appoint, and then wills that his executors shall sell, a purchaser from the executors is *in* under the surrender and is entitled to admittance,—and *that* although the executors will of course exercise this power by deed; which really brings it to the very case now presented to the Court. So that in truth the point whether a limitation of copyhold land to such uses as *J. S.* shall by deed appoint, be good or not, was as completely bound by decision as any other point of copyhold law. In this view *Beale v. Shepherd* (b), and *Holder v. Preston* (c), are authorities which govern the principal case. [*Taunton*, J. In

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OUNDL.First point:
Validity of
power.

(a) 8 Dowl. & Ryl. 624; 5 Barn. & Cressw. 776,

(b) Cro. Jac. 199.

(c) 2 Wils. 400.

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those cases the executor has a mere *power* without an *ownership*.] Besides, shifting or executory limitations, of which powers are merely a species, had long been held good in relation to copyholds; *Coke's Complete Copyholder*, sect. 35(a), *Paulter v. Cornhill* (b), *Bentley v. Delamar* (c). The doubt has arisen from confounding the common law operation of the *surrender* with the equitable or fiduciary character of the *use* limited upon it. Here, the surrenderor continued tenant to the lord (d). If the effect would be to place the tenancy *in abeyance* during the interval previously to the exercise of the power of appointment, the objection urged on the part of the lord could not be resisted. But the lord has no ground of complaint. *He* has no right to insist that the surrender shall be so framed as to create a necessity for admittance. If the lord has a tenant to perform the services, his right is satisfied. It matters not to the lord to whom the use is limited in default of appointment. Whether it is limited to the donee of the power, or to a stranger, or whether it results to the surrenderor for want of a limitation in default of appointment, is immaterial to him, as in each case the surrenderor would continue tenant. It is also quite immaterial whether the power *precedes* or is *subsequent* to the limitation of the fee,—whether the limitation be to such uses as *A.* shall appoint, and in default of appointment to uses expressed, or whether it be to uses expressed, *followed* by a power to *A.* to make and appoint new uses. In effect, every power of appointment is a power of revocation and new appointment. Upon the execution of every power, some estate must be wholly or partially revoked, as the estate cannot but vest subject to the power. In *Boddington v. Abernethy* (e) copyhold lands were surrendered to the uses of a settlement which contained a power to revoke and limit new uses, and it was held that the uses limited by the execution of this power

(a) Page 81.

(b) *Cro. Eliz.* 361.

(c) *Freeman's Rep.* 267, 268;
pl. 293.

(d) See *Rex v. Lady Mildmay*
ante, vol. ii. p. 778.

(e) 8 *Dowl. & Ryl.* 624; 5 *Bar-
 & Cressw.* 776.

were good. This case established the validity of a power of revocation and new appointment over copyhold lands. It has been shewn that such power is not distinguishable from the power in the principal case; and if the validity of the power be conceded, the right of the appointee to be admitted seems to be irresistible. Powers of appointment and executory limitations are identical, *Sugden on Powers* (a). Every power of appointment is in truth nothing more nor less than an executory limitation. Is *Dawson* to be admitted, notwithstanding that the use limited to him was defeated by the execution of the power? To what a length this doctrine would lead! Suppose an executory limitation of copyhold land to the use of *A.* in fee, but if *B.* shall return from Rome then to the use of *B.* in fee; *B.* returns from Rome before *A.*'s admittance, thereupon the use limited to *A.* ceases. Will it be contended that *A.* is nevertheless entitled to be admitted? Yet *A.* would be as much entitled to admission as *Dawson* in the principal case. If powers and executory limitations stand (as they confessedly do) upon the same principle, the defendant must contend that in every case of an executory limitation of a copyhold, the person to whom the use is limited, subject to the executory limitation, continues after failure of such use, by the taking effect of the executory limitation, to be the person entitled to admittance, and on whose admittance the lord may insist. [*Littledale, J.* Suppose *Dawson* had been admitted and become tenant, could he afterwards have made an appointment so as to divest the estate of the actual tenant, and entitle the appointee to admittance without surrender?] It is conceived that if *Dawson* had been actually admitted, and had afterwards made an appointment, his appointee would have been entitled without more to immediate admittance, the appointment operating to defeat his estate. It was so held in *Boddington v. Abernethy* (b). [Lord Denman, C. J. You go the length of saying that Rags-

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Second point:
Title to admittance in appointee.

(a) 4 ed. p. 11, 12; *Fearne on Cont. Rem.*, by Butler, 564, note. (b) *Supra*.

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dell continued tenant notwithstanding that he had surrendered his interest to others.] It has always been considered that the surrenderor continues tenant till admittance is had under the surrender. [*Patteson*, J. The admittance relates back to the original surrender, *Rex v. Lady Mildmay* (a).] Here the power was executed, and from the time of its execution *Dawson's* interest was divested, and by relation, the surrender was to the immediate use of the appointee. Can *Dawson* and *Pruday* be now consecutively admitted under this surrender? If *Dawson* is now entitled to be admitted *Pruday* cannot be entitled to be admitted, because *Pruday's* claim is founded on the appointment, which, if valid, necessarily supersedes the interest of *Dawson* and takes away his title to admittance. [*Patteson*, J. You contend that a party may claim to be admitted when his interest is vested in possession, although there has been no admittance in respect of previous interests created by the same surrender, and without reference to such interests?] That is in substance the argument for the prosecution. The moment the power of appointment was fully executed, the interest of *Dawson*, liable from its inception to be defeated by the execution of the power was *absolutely gone*, and from that moment the right to be admitted was exclusively in the appointee. On every principle, the admission of *Dawson* would be wrongful. The power of appointment is, in fact, nothing more than an option of declaring *to whom* the use of the surrender shall enure. Much has been urged against executory limitations of a copyhold, on the ground of their contravening the rules of the common law, but the use of a copyhold is rather an equitable than a legal interest. The surrender certainly is a common law assurance, but the use is merely the beneficial interest in the copyhold, and the lord is quasi a *trustee* for the purposes indicated by the surrender; *Brookes's case* (b), *Wright's Tenures* (c). It is true

(a) *Ante*, vol. ii. 778; 5 Barn. & Adol. 254.

(b) Poph. 125.
 (c) P. 219.

that the lord is at this day *compellable*, by *legal* process, to admit the person to whose use the surrender is made, but the surrenderee has no *legal estate* till admittance, nor is he, for *any* purpose, tenant to the lord. In many manors it has been the custom to admit upon executory limitations, including uses limited under powers of appointment. In practice, conveyancers are familiar with titles derived under *appointments*; and such titles are accepted, whether the appointment and the admittance of the appointee have or have not been preceded by the admittance of the person to whom the use was limited in default of appointment, and without reference to *that* consideration. But if *Pruday* be not entitled to admittance, it will follow that in every case, at least where the appointee has been admitted without the previous admission of the taker of the use limited in default of appointment, the admittance is wrongful, and the legal title consequently bad; while, on the other hand, the title would be good at law, if *after* the execution of the power, the previous taker were admitted (of course it must be contended rightfully) instead of the appointee, and the title were derived under a subsequent admittance of the appointee, without any surrender or release from the previous taker; for to insist that such *surrender* or release is necessary, would be to retract the admission which has been made on the other side, that the power is well created.

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Campbell, A. G., (with whom was *Swann*,) for the defendant. This is an attempt to introduce a novelty into the law of copyholds. No such instrument as that of the surrender by *Ragsdell* was ever attempted to be imposed upon the lord of a manor. This is a surrender with a double aspect. According to this doctrine, *Dawson* might appoint to such uses as the purchaser *from him* should appoint, and that purchaser might appoint in a similar manner, so that an infinite number of persons might have the entire disposition of the estate, of whom each would be *entitled* to admission, without the admission of any one being *necessary*. [*Patte-*

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son, J. That has been done; *Rex v. Lord of the Manor of Hendon* (a).] There the parties had merely *equitable* interests. In this case, *Dawson* might have brought *ejectment*. If *Dawson* were merely the donee of a *power*, his appointee would be entitled to admittance; but he has an *interest*, and is therefore entitled to be admitted; *Lord Kensington v. Mansell* (b). There can be no substitution of one copyhold tenant for another, except by surrender and admittance, and the surrenderee cannot surrender before admittance. *Dawson* is a surrenderee, and therefore, until admittance, he cannot surrender. It has been said that it is immaterial whether the power of appointment precedes or is subsequent to the limitation of the fee. [*Patteson, J.* The power is merely an expression of that which would be necessarily implied (c).] It is; and this is a contrivance, by expressing what would necessarily be implied, to avoid the necessity of the admission of the purchaser. *Dawson* might bring *ejectment*, and be admitted on the morning of the trial; *Holdfast v. Clapham* (d), *Doe d. Bennington v. Hall* (e). He is the absolute *owner* of the land. [*Taunton, J.* The surrenderee cannot enter and take the profits of the land before admittance. You have conceded that if there was *merely a power*, the appointee might claim admittance.] In the case of a devise, with a power to the executors to sell, it is true the executors need not be admitted, because they have no interest; but if the estate be devised *to the executors to sell*, they have an interest, and must be admitted. The distinction has always been taken between a power and an interest; *Beal v. Shepherd* (f). In *Holder d. Sulyard v. Preston* (g), the Court says, "It is objected for the plaintiff that the trustees (who have no estate or interest given them by the will, but are only ordered and directed to sell,) ought

(a) 2 T. R. 484.

(b) 13 Ves. jun. 246.

(c) *Q. d.* That *Dawson* might, without the power, do by surrender, that which the power autho-

rizes him to do by appointment.

(d) 1 T. R. 600.

(e) 16 East, 208.

(f) Cro. Jac. 199.

(g) 2 Wils. 402.

first to have been admitted before they could have power to sell. In answer to this, we are of opinion, that when the devisor died, the power to sell was instantly in the trustees; and that where a man by his will gives power to sell, the land descends to his heir until that power be executed. There is a great difference between a naked power and a vested interest." [*Littledale, J.* Has the lord, in ordinary cases, a right to compel the surrenderee to be admitted? or must he not be satisfied with the surrenderor for his tenant? In *King v. Dilliston*(a) there was a *special custom* that the person to whose use the copyhold estate was surrendered should come in and be admitted after three proclamations; which *custom* was held good.] *Doe v. Barthrop*(b) shews the distinction which has been made between a power and an interest. [*Patteson, J.* I do not think that case at all in point. The question there raised was very different from that now under discussion. *Littledale, J.* You must go the whole length of saying that the power was altogether nugatory.] *Dawson* has no greater right of disposition over the property *with* the power, than he would have *without* it. [*Taunton, J.* It has been decided that a power of appointment may co-exist with a seisin in fee; *Maundrell v. Maundrell*(c).] [*Patteson, J.*, referred to *Roach v. Wadham*(d), and *Badham v. Mee*(e).] There is no instance of a person who, having an *interest* in copyhold lands as well as a *power*, has executed the power before admittance. In *Rex v. The Lord of the Manor of Hendon, Bonham* covenanted to assign to *Goodrich*, who assigned to *Rankin*; and it was held that *Goodrich* need not be admitted; but it is to be observed that *Goodrich* had only an *equitable* interest. *Boddington v. Abernethy* merely shews that there may be an executory limitation of copyhold. If the Court grant a peremptory *mandamus*, the *lord* must obey; whereas if the Court enter-

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(a) 3 Mod. 221.

(d) 6 East, 289.

(b) 5 Taunt. 382.

(e) 7 Bingh. 695; 1 Moore &

(c) 7 Ves. jun. 567; 10 Ves. Scott, 14. And see *Ray v. Pung*, 5 Barn. & Alders. 561.

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tains any doubt, and does not quash the return, the prosecutor may file a bill in Chancery.

Hayes, in reply. There is nothing novel in the doctrine for which the prosecutor now contends. Mr. *Sanders*, in his tract "*On Surrenders of Copyhold Property*," with reference to future and springing uses, has considered the cases and law on the subject, and thus expresses his opinion: "And in fact, in every surrender to such uses as the surrenderor shall appoint, either by deed or will, (and which in practice is of frequent occurrence,) the use to arise under the surrender, is a use commencing in futuro." He does not say, indeed, that there may be a limitation of the fee, in default of appointment, to the donee of the power. He left it to be presumed that if an executory limitation could exist at all in copyholds, it was not important whether the fee, in default of appointment, were limited to the surrenderor, the surrenderee, or a stranger. It is now insisted that the power of appointment merged in the fee. Upon this point *Maundrell v. Maundrell* (a) is alone decisive. To hold that the power is merged in the fee would shake half the titles in the kingdom. In *Doe d. Wigan v. Jones* (b), an estate was limited to such uses as *B.* should appoint,—and in default of appointment, to *B.* for life, with a limitation during the life of *B.* in case of forfeiture,—remainder to *B.* in fee: A judgment was obtained against *B.*, and an elegit sued out, and it was held that the execution of the power of appointment defeated the claim of the judgment creditor. This case has been acted upon to a great extent in practice. If *Dawson* had been admitted, and had then surrendered to the use of a purchaser, he could not have afterwards executed the power in contravention of his own *alienation* by surrender. But after *admittance*, he would have retained the power of appointing the use, and would have possessed, concurrently with it, the right of passing his estate by surrender; thus enjoying concurrently two distinct species of dominion. Until the execution of the deed of appointment, the use of

(a) 7 Vcs. 567; 10 Ves. 246.

(b) 10 Barn. & Cressw. 459.

the original surrender was still directory ; but as soon as the appointment was made, the use was fixed in *Pruday*, and the whole effect of the surrender ascribed to him, leaving not a shadow of use or interest in *Dawson* to entitle him to be admitted. This attempt to impeach the validity of the power, is quite inconsistent with the admission made at the outset of the argument. The ground which the defendant's counsel is constrained to take, strikes the power of appointment out of the surrender. The decision in *Boddington v. Abernethy* goes, in *principle* at least, the whole length of this case. It is, indeed, a *stronger* case ; for there the execution of the power was held to have defeated estates *perfected by admittance*, whilst, in the principal case, it is sufficient to maintain, that the appointment overreached the *use* limited in default of appointment, while that use yet continued in its *fiduciary state*. It is said, that *Dawson*, while he had the complete power of disposition over the use, was substantially the *owner*, under the limitation in default of appointment, and that to decide in favour of the prosecutor would be to permit the privileges of a legal tenant to be virtually enjoyed, without incurring the legal consequences of tenure. But it is a mistake to say, that *Dawson* had any *legal ownership*. If he had entered upon the land he might have been treated as a trespasser. He had no legal estate ; he could not have exercised any of the rights or privileges of a copyholder. It is true, he had a right to come to this Court for a mandamus *to be* admitted. He had his election either to claim admittance in respect of the use limited *to him* in default of appointment, or to *defeat* that use by an exercise of his power of appointment ; and he has chosen the latter course. No answer has been given to the argument, that if *Dawson* is *now* to be admitted, every person to whom the *use* of a copyhold is limited, subject to an executory use, must be admitted, notwithstanding *his* use has been superseded by the absolute vesting of the *executory use*. Suppose it were conceded to the lord that *Dawson* ought to be admitted ; how is *Pruday*, who has purchased

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and paid for the estate, to be afterwards put into legal possession? Is *Dawson* to surrender to the use of *Pruday*? But this Court would have no power to compel such surrender, nor without it to compel the admittance of *Pruday*; and if therefore *Dawson* should refuse to surrender, *Pruday* would be driven to seek his remedy by bill in equity. It was incumbent on the other side to shew how the admittance of *Dawson* would be made to consist with the title of *Pruday*.

Cur. adv. vult.

In the course of this term the judgment of the Court was delivered by

LORD DENMAN, C. J.—The question in this case arose on the return to a writ of mandamus, issued at the instance of *John Pruday*, to compel his admission to certain copyhold hereditaments. The writ surmised, that *Ragsdell*, being seised in fee, surrendered to such uses as *Dawson* should by deed direct and appoint; and in default of and until such direction and appointment, to the use of *Dawson* in fee; and that *Dawson* did afterwards, by deed, direct and appoint that the premises should remain to the use of *Pruday*, who thereupon became entitled to be admitted. The return introduced no additional fact, but stated, by way of observation, that *Dawson* had never been admitted, and that neither he nor *Ragsdell* had ever surrendered to the use of *Pruday*. And whether such admittance and surrender were necessary, was the question argued before us: *Pruday* claiming to be admitted, as the person to whose use the surrender by *Ragsdell* enured by virtue of the deed of appointment executed by *Dawson*; while the lord contended, that as *Dawson* took not only a power of appointment, but also an interest in the meantime, under the surrender, he ought to have been admitted and to have paid his fine, before he could appoint to *Pruday*. The application to copyhold property, of the general doctrine, that an appointee under a power,

takes by the instrument creating the power, and not under that by which the power is executed, was not disputed; nor was it denied that trustees, with a mere power to sell, were not compellable to come in as tenants, in conformity with *Beal v. Shepherd* (a) and *Holder d. Sulyard v. Preston* (b). But a distinction between those cases and the present was strongly insisted upon: that, here, *Dawson* was not a mere trustee to sell, but was surrenderee in fee for his own benefit, until and unless he should make an appointment;—that the event might never have happened;—and that, at any rate, without his being admitted, his interest could not be transferred to *Pruday*. But, it appears to us that these premises may be correct, without leading to the conclusion. The lord never is, or can be, for one moment deprived of a tenant; for the estate must always be in some person. In the two cases above cited, of trustees to sell, without an interest, the estate was not in abeyance till sale, but remained in the heir of the devisor, which heir the lord might have compelled to be admitted, if, by reason of the sale's not being made, no person presented himself to the lord for admittance in reasonable time; but when such sale was made, the purchaser was entitled to be admitted under the surrender to the uses of the will, just as if he had been a devisee named in it. So here, *Ragsdell* remains tenant to the lord until some person is admitted under his surrender. No doubt *Dawson* might have declined to execute any deed of appointment, and if he had declined, he could not, without admittance and surrender, have passed his interest to another; but as he has chosen to execute a deed of appointment under the power, his appointee, the present applicant, takes nothing from him, but becomes the surrenderee of *Ragsdell*, just as if he had been named in the surrender. It follows that he is entitled to be admitted, without *Dawson's* having been admitted, and that a peremptory mandamus must issue. What the effect of *Dawson's* being

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(b) 2 Wils. 400.

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admitted might have been, is a question which we are not required to determine.

Rule absolute for a peremptory mandamus.

Upon a return to a mandamus which is considered to be insufficient, the Court will not, at the request of the defendant, direct the prosecutor to demur to the return, instead of awarding a peremptory mandamus.

Semble, that a prosecutor could not so demur.

In a subsequent part of the term, *Swann*, for the defendant, obtained a rule to shew cause why the rule for quashing the return should not be varied by ordering the prosecutor to demur to the return, and the defendant forthwith to join in demurrer, and judgment thereupon to be entered upon record that the said return should be quashed for the insufficiency thereof, and a peremptory writ of mandamus awarded; upon payment, by the defendants, of the costs of this application. This rule was obtained upon an affidavit of the steward of the manor of Oundle, stating that the defendant was desirous of having the judgment of this Court reviewed by another tribunal, and that he had not yet been served with the peremptory writ of mandamus.

Platt shewed cause. The effect of this rule, if made absolute, would be to deprive the prosecutor of the benefit of the judgment of this Court lately delivered, by enabling the defendant to bring a writ of error, and carry the case to another Court. The rule is only upon payment of the costs of this application. [Lord *Denman*, C. J. The rule was to have been "upon payment of all future costs."] There is no precedent for the course which the Court are asked to pursue.

Campbell, A. G., and *Swann*, contra. It would be a hardship on the defendant not to allow him to take this case to another tribunal. [Lord *Denman*, C. J. The awarding of a writ of mandamus is not such a judgment as error can ordinarily be brought upon.] It seems to be a just construction of the statute of 9th *Anne*, c. 20, to say, that it

was intended that a party should have a power of *demurring* to the return to a mandamus, although *in terms*, that act only authorizes the party prosecuting the writ, "to *plead* or *traverse* all or any of the material facts contained within the said return." A *demurrer* is a *plea* (a), for a *plea* is merely an *answer* of some sort to that which has been alleged on the opposite side. If there may be a demurrer to the return, there may be a writ of error. [*Patteson, J.* Is there any case?] None has been discovered. [*Patteson, J.* The act does not give a writ of error, and the practice is against your construction. The custom has always been, to move to quash the return, if the party did not think proper to plead or traverse, and if the return was quashed, then to grant a peremptory mandamus.]

Per Curiam.

Rule discharged with costs.

(a) Under 36 *Edw. 3*, c. 13, (which enables the claimant of lands seized into the king's hands, by inquest or other office, to traverse the office or otherwise to shew his right,) the claimant of lands, and even of goods, which have been seized into the king's hands, by pretext of a writ of extent, may not only traverse, i. e. deny the king's title or the cause of seizure under the first branch of the clause, or confess and avoid the king's title under the second branch, but he may, under the second branch, *demur* to the title of the crown, if

his own title appear upon the face of the inquest, or is stated by way of inducement to the demurrer; vide 50 *Ass. fo.* 322, pl. 1; *Bro. Abr. tit.* Demurrer in ley, pl. 25; *Hardres*, 176; *Mann. Exch. Pract. Revenue Branch*, 2d ed. 106, 117. The object of the motion in the principal case, however, does not appear to have been simply to substitute a demurrer for a plea, but to give to the defendant an opportunity of raising a question of law upon the record, where the legislature has given that power to the prosecutor only.

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BISHOP v. HATCH, Clerk, an Insolvent Debtor.

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The sequestration given to the assignees of an insolvent beneficed clergyman, by sect. 27 of 7 Geo. 4, c. 57, and for the granting of which the order of adjudication is to be a sufficient warrant, does not relate back to the time of the assignment to the provisional assignee, so as to entitle the assignee to be satisfied before judgment creditors who have obtained sequestrations in the interim.

The 34th section of 7 Geo. 4, c. 57, which invalidates certain *executions* issued subsequently to the imprisonment of an insolvent debtor, upon a judgment entered up on a warrant of attorney or *cognovit actionem*, does not extend to a *sequestration* granted in pursuance of a writ of *sequestrari facias*, issued upon such a judgment.

Whether the Bishop must of necessity be made a party to a rule calling upon a plaintiff, to whom the Bishop has granted a sequestration, to shew cause why such sequestration should not be set aside, *quære*.

BISHOP } IN this case, the Court, in last Michaelmas
v. } term, granted a rule calling upon the plaintiff
HATCH. } to shew cause why the sequestration granted to him against the defendant's benefice at Sutton, in the county of Surrey, should not be set aside.

By another rule of the same term, it was ordered that the above rule should be turned into a special case, and set down in the special paper for argument.

A special case was drawn accordingly, which, after setting out the above rules, stated the following facts :

10th August, 1832, the defendant, rector of Sutton, in the diocese of Winchester, was arrested for debt at the suit of one *Twose*, and gave bail.

12th November, 1832, the defendant surrendered to prison in discharge of his bail.

28th November, 1832, the defendant, being in custody, subscribed and filed his petition to the Court for the Relief of Insolvent Debtors, and conveyed and assigned his real and personal estate to the provisional assignee, who subsequently, (on 29th April, 1833,) conveyed and assigned to the present assignees.

In the same month of November the plaintiff commenced the present action. He subsequently obtained a verdict, upon which, in January, 1833, or early in February, 1833, judgment was signed.

18th February, 1833, a writ of *sequestrari facias* upon this judgment issued to the Bishop of Winchester, in pursuance of which, on

1st March, 1833, the Bishop granted sequestration.

The defendant had, on 28th February, signed his schedule, and on 5th March duly filed it.

15th April and 14th May, 1833, the matters of the petition and schedule were heard before the Insolvent Debtors' Court.

14th May, the Court declared and adjudged the defendant to be entitled to the benefit of the act.

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CHUTEA } In last Michaelmas term, the Court granted a
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HATCH. } why the sequestration issued against the defendant's benefice, granted by the Lord Bishop of Winchester, upon the judgment entered up on the warrant of attorney given by the defendant to the plaintiff, should not be set aside, and why the sequestrator named and appointed in and by the said sequestration, should not pay over to the assignees of the defendant, all sums of money by him received under or by virtue of the said sequestration.

By another rule, made at the end of the same term, it was ordered that the above rule should be turned into a special case, and set down for argument, and that in the meantime the sequestrator should receive and hold all property under the sequestration, and keep an account thereof.

A special case was stated, which was similar to that of *Bishop v. Hatch*, except as to the ex parte facts of the plaintiff's title. These were as follow:

January, 1824. The defendant executed a warrant of attorney, to confess judgment in an action of debt for 1200*l.*, at the suit of the plaintiff, which judgment, it was declared by the warrant of attorney, was intended to be a further security to the plaintiff for an annuity of 69*l.* a year, granted to him by an indenture of the same date. The defeazance authorized the plaintiff, whenever the annuity or any part thereof should be in arrear for twenty days, to sue out such execution as he should think fit for the recovery of such arrears and costs.

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February, 1824. Judgment was entered up on this warrant of attorney.

There being arrears of this annuity to a large amount, on 3d November, 1832, the plaintiff (having previously sued out a writ of testatum *fi. fa.* upon the judgment, to which the Sheriff of Surrey returned *nulla bona*, and that the defendant was a beneficed clergyman, having no goods and chattels, nor any lay fee, within his bailiwick,) caused a writ of sequestrari facias to issue, founded upon the said return, directed to the Bishop of Winchester, and indorsed to levy 49*l.* 14*s.* besides expenses. The writ of sequestrari facias was duly left with the registrar of the diocese, and the sequestration bespoken on the same day.

5th December, 1832, the Bishop granted to *J. C. Hall*, on behalf of the plaintiff, a sequestration (dated 6th December, 1832,) of the rectory of Sutton, of which the defendant was and still continues the incumbent. *Hall* and a surety gave a bond to the Bishop, the condition of which was, that *Hall* should collect the fruits, tithes, &c. of the parish of Sutton, and cause the parish church to be served; and, moreover, should make a true account of his receipts and payments in that behalf, when he should be thereunto required; and should also keep harmless the Bishop and all his officers and ministers against all manner of persons whatsoever, by reason of the tithes so to be collected by him or his assigns.

*Hall*, in the performance of his duty as such sequestrator, has received considerable sums of money on account of the tithes and other profits of the benefice, and has also necessarily expended considerable sums of money in the execution of such duty, and in fulfilling the conditions of the bond.

BISHOP v. HATCH. } The defendant's assignees have ap-  
 CHUTEK v. Same. } plied to the Bishop to grant them a  
 sequestration of the profits of the benefice of Sutton, for  
 the payment of the insolvent's debts; but the Bishop has

refused to grant such sequestration until the question as to the validity of the sequestrations that have been already granted, shall have been decided by this Court.

Besides the sequestrations granted to the plaintiffs in the two actions, several other sequestrations had issued against the defendant's benefice at the time when the above application was made by the assignees, over all of which, including that in favour of *Bishop*, the plaintiff *Chuter*'s writ of sequestration has priority.

The assignees contend that all the sequestrations are invalid as against themselves.

The questions for the opinion of the Court are, whether or not the two sequestrations, granted by the Lord Bishop of Winchester to the plaintiff *Bishop* and the plaintiff *Chuter*, are valid, and whether the assignees are entitled to have the moneys received under the sequestration granted to *Chuter* paid over to them, or to have any other order of the Court made respecting the same, for their benefit.

The facts of the two cases being so nearly alike, the Court directed that they should be argued together.

*Harrison*, for the plaintiff *Bishop*. The question is, whether, under the 11th section of the Insolvent Debtors' Act (a), which section directs the assignment of the insolvent's effects, taken in connection with the 28th section, which particularly relates to ecclesiastical property, the assignees are entitled to sequestration of the defendant's benefice, *as from the date of the assignment to the provisional assignee*. By section 11, every prisoner applying for relief under the act must, at the time of subscribing his petition, execute a conveyance and assignment to the provisional assignee of the Insolvent Debtors' Court of all his estate, right, title, interest, and trust, in and to all his real and personal estate. By section 28 it is provided, that

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First point:  
Whether assignees of insolvent beneficed clergyman take any interest in the benefice by the general assignment under sections 11 and 28 of 7 Geo. 4, c. 57.

(a) 7 Geo. 4, c. 57.

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nothing in that act contained shall extend *to entitle the assignees of the estate and effects of any prisoner, being a beneficed clergyman, to the income of such benefice* for the purposes of that act, but that the assignees *may apply for and obtain a sequestration* of the profits of such benefice, for the granting of which sequestration *the order of adjudication is to be a sufficient warrant*, without any writ or other proceedings to authorize the same, and such sequestration is to be issued as the same might have been issued upon any writ of *levari facias*, founded upon any judgment against the prisoner. These two clauses are to be construed as if the latter were an exception engrafted upon the general rule contained in the former. It was the intention of the legislature to put the assignees of an insolvent debtor upon precisely the same footing as *judgment creditors*, by *substituting the order of adjudication* for the ordinary writ of *levari facias*; so that upon the order of adjudication being deposited with the Bishop, all the consequences of issuing a *levari facias* would follow, and amongst them would be included the usual course as to priority of satisfaction.

*Arbuckle v. Cowtan* (a) decides that ecclesiastical property does not pass under the general assignment of an insolvent's effects. If therefore the assignees take the property at all, it must be under the 28th section. But the requisites of that clause are in the nature of conditions precedent. Other execution creditors, therefore, who obtain sequestration before the performance of the condition precedent, are entitled to priority. The adjudication is a condition precedent; and the sequestration obtained by the plaintiff, having been granted to him *before* the adjudication, he is entitled to priority. In several other sections of the act, the authority of the assignees to claim certain species of property, is dated from the adjudication.

In the 11th section, under which the general assignment is made, there is a provision that if the petition be dis-

(a) 3 Bos. & Pul. 321.

missed, the assignment shall be void; and other parts of the act shew it to have been the intention of the legislature that the assignees should, by the general assignment, take a *defeasible* title only; and it seems clearly to have been intended, that the assignees should take no property in the benefice of an insolvent clergyman, until after their general title as assignees should have been *perfected* by the adjudication. If benefices passed by the general assignment in the same manner as other property, the title to them would also be in a manner in abeyance until the right of the assignees was perfected, and, in the interim, the church would in all probability be wholly unprovided for. That this could never have been intended to be sanctioned by the legislature, is evident from the order of adjudication having been put precisely on the same footing as the writ of *levari facias*, in which proceeding the bishop takes a bond from the sequestrator that he will provide for the church. It follows, therefore, that as in the present case the writ of *levari facias* was lodged before the order of adjudication, it is entitled to that priority, which under ordinary circumstances would exist between execution creditors, and therefore entitles the plaintiff *Bishop* to that preference over the assignees for which he contends.

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*J. Leycester Adolphus*, for the assignees. It is not contended that the assignees of the insolvent debtor have an *absolute control* over the benefice from the time of the execution of the assignment, but it is submitted that they have such a right as excludes any other person from obtaining sequestration subsequently to the *imprisonment* of, or at least the *assignment* by, the insolvent. The fundamental principle of the insolvent law is, that the debtor shall be discharged from prison upon condition of his property being equally divided amongst his creditors; and there is no reason why a clergyman should be discharged without performing the usual condition. The 11th section, and many others, afford good ground for saying, that by the assign-

First point.



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ment to the provisional assignee, ecclesiastical benefices would pass, unless such a construction is contradicted by other parts of the act, or opposed by some known principle of law. The 11th, the 16th, the 24th, and other sections, and especially also the form of the assignment itself, strongly demonstrate that it was the intention of the legislature to "give to the assignees, for the advantage of the creditors, *every* beneficial matter belonging to the insolvent's estate," as was said by Lord *Tenterden* in *Wright v. Fairfield* (a). Then the question is, how far the interest, which passed to the assignee, is limited or qualified by the 28th section. That the interest of the assignees is in *some* degree limited cannot be denied, but it is submitted that sufficient interest remains in them to give them a right to exclude every other creditor, until their interest is perfected by the adjudication. The legislature appear to have thought that ecclesiastical property would, *but for* the provisions of the 28th section, have passed to the provisional assignee *absolutely, and in a manner somewhat inconsistent with its nature*, and therefore take the precaution of inserting the 28th section. This consideration appears to afford a key to the construction of the section. The incumbent has only a qualified property in the benefice for his life, subject to the right of the ordinary to enforce the application of a portion of the profits of the benefice for the service of the church. If the assignees were entitled *absolutely* to the whole of the property of the insolvent, the inconvenience pointed out in the argument for the plaintiff would arise, and the assignees would in fact possess more control over the property than the incumbent himself had. The 28th section obviates this. It is sufficient for the defendant to establish, that the assignees take some present right in the name of the whole body of creditors; and whatever may be the nature of that right, it will exclude any individual creditor from subsequently acquiring a legal possession of the property. If the assignees have any right,

(a) 2 Barn. & Adol. 737.

it must come to them by the assignment. The 28th section merely says, that the order of adjudication shall be a sufficient *warrant for granting the sequestration*. Where a *mode of obtaining execution* is given to a party, it is to be inferred that he has some previous inchoate *right*. Other parts of the act afford instances of the assignees having the same kind of qualified right; for example, the 16th and 27th sections. *Arbuckle v. Cowtan* has been cited. That was an action of assumpsit for use and occupation, brought by the assignees of an insolvent rector, who had demised his benefice. The assignees brought their action as if they were fully in the place of the incumbent, and the Court refused to allow them to recover, on the ground that ecclesiastical revenues could not be administered by lay hands, without the intervention of some ecclesiastical authority. Lord *Alvanley* uses these words: "That a private creditor should be able to avail himself of a writ of sequestration, for the purpose of satisfying his debt out of the benefice of a clergyman, and yet that where the legislature has vested the whole of the property of the debtor in assignees, for the benefit of the creditors in general, those assignees should not have any power to affect his benefice, would certainly be an anomaly in the law." From this passage it may be inferred that Lord *Alvanley* thought that the assignees *had* a right to the profits, though they had no right to take them with their own hands. At that time there was no clause as now, saying that the adjudication should be a sufficient warrant for the granting of sequestration, which may be regarded as a provision enabling the assignees to *reduce into possession* a pre-existing right. It is not contended in this case, that the assignees have a right to administer the proceeds of the benefice, except through a certain medium. When it is said that *on the adjudication being made*, the assignees shall have the *right of sequestration*, it is necessarily intended that no one shall be enabled to step in during the interval between the assignment and the adjudication. This almost comes up to the maxim "*Quando*

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aliquid conceditur, conceditur et id sine quo res ipsa uti non potes." It is said that the object of the act was to put the assignees upon the footing of judgment creditors: that *may* perhaps be the object, but if the construction contended for by the plaintiff be adopted, the assignees will *not* be upon the same footing as the judgment creditors. The judgment creditors, who as creditors have notice from the insolvent that he is about to take the benefit of the act, will always be able to watch the proceedings of the assignees and to step in before them, and thus frustrate the whole policy of the insolvent law.

Second point:  
 That the bishop should be made a party to the rule.

*Shee*, for the plaintiff *Chuter*. The *form* of the rule is bad. This Court cannot set aside a sequestration granted by the bishop, without making him a *party* to the rule. To do this would be against principle, and inconsistent with the invariable practice; *Rex v. The Bishop of London*, in a cause of *Flannagan v. Tomkins*, clerk (a), *Bennett v. Apperley* (b), *Hart v. Vollans* (c), *Marsh v. Fawcett* (d).

Third point:  
 Whether sequestration upon judgment on warrant of attorney, issued since the assignment, is void under sect. 34 of 7 Geo. 4, c. 57.

Writs of sequestration are of two kinds,—one issuing from the Common Law Court to the bishop, and the other from the Bishop's Court. Here, the writ of sequestration out of this Court was issued before the imprisonment of the debtor, the other writ of sequestration was issued subsequently. This is an application to set aside the writ of sequestration issuing from *this* Court. [*Parke, J.* The rule is, to set aside the sequestration granted by the bishop.] This Court cannot directly interfere with the *bishop's* sequestration. The question is, whether this *execution*, being upon a judgment upon a *warrant of attorney*, is void as against the assignees. That depends upon the 34th section, which enacts, that where any prisoner shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, no person shall, after the commencement of the imprisonment of such prisoner, avail

(a) 1 Dowl. & Ryl. 486.

(b) 6 Barn. & Cressw. 630.

(c) 1 Dowl. P. R. 434.

(d) 2 Hen. Black. 582.

himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either *by seizure or sale* of the property of such prisoner. In the case of an execution upon ecclesiastical property, there is neither seizure nor sale. An *elegit* would not be within this section; *à fortiori* it cannot extend to a *sequestration*. [Parke, J. The 34th section is analogous to the 108th section of the Bankrupt Act.]

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If the 28th section has any operation at all upon the First point. 11th, that operation is to make it clear beyond doubt, that ecclesiastical property was *not* intended to pass by the assignment. *Arbuckle v. Cowtan* having previously to the passing of the present act decided that such property did not pass under the general assignment of an insolvent's estate and effects, the 28th section of this act could only have been inserted by the legislature from an excess of caution. [Lord Denman, C. J. The 28th section seems like an *exception* introduced into the 11th.] The legislature intended that the assignees of an insolvent clergyman should acquire a title to his ecclesiastical property only in one way, viz. by *application* to the bishop. Reliance has been placed on the words in the 28th section, that the order of adjudication "shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same." This merely puts the *adjudication* on the footing of a *judgment*.

If the Court were to hold that the sequestration of *Bishop* was good as against the claim of the assignees, and that of *Chuter* not so, the consequence would be, that the *order of priority would be inverted as between Bishop and Chuter*; in other words, *Bishop* would then have his debt satisfied before that of *Chuter*, without his having a shadow of right to such priority of satisfaction.

*Adolphus*, for the assignees. [Lord Denman, C. J. Mr. Second point. *Adolphus*, how do you answer the objection as to the bishop's

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not being a party to the rule?] This is an application to set aside process which the bishop has issued *ministerially*. [Lord Denman, C. J. Have you any authority for saying that the bishop acts ministerially when he grants sequestration?] The bishop is called in the books the *ecclesiastical sheriff*. [Lord Denman, C. J. The bishop has a discretion as to the amount for which a sequestration shall issue.] In *Britten v. Wait* (a), and *Newland v. Watkin* (b), and also in *Flight v. Salter* (c), and that class of cases, the bishop was not a party to the rule. [Littledale, J. It is reasonable that the bishop should be a party to the rule, because the duty of taking care that the church is provided for devolves upon him, and because he might be called upon to pay over a large sum of money.] The Court has already directed the sequestrator to keep an account. All that is necessary is to refer it to the master to say what money shall be paid. [Lord Denman, C. J. We will not stop the case upon this point.]

Third point.

It cannot be doubted that the 34th section was intended to apply to the case of a sequestration as well as to all other kinds of execution. [Lord Denman, C. J. The Court feel that a difficulty arises from the words "*seizure and sale*."] The sequestration, according to the form given by Mr. Tidd(d), directs a seizure and sale. The intention of the clause was, that no execution which warrants a seizure or sale, should issue after the imprisonment of the party; as it is submitted that a sequestration clearly warrants a seizure and sale; or else the intention was, that execution should not be in any way executed after the imprisonment of debtor. The language of the clause is this,—that no person shall avail himself of any execution issued or to be issued upon any judgment upon warrant of attorney, or *novit actionem*, either by seizure or sale of the prison property, or by sale of such property theretofore. The meaning of this is, that after the imprisonment,

(a) 3 Barn. &amp; Adol. 915.

(b) 9 Bingh. 113.

(c) 1 Barn. &amp; Adol. 67

(d) Tidd's Forms, 435

shall be taken in any execution, *not even by sale*, in cases where the property had been *previously seized*. It is obvious that the intention cannot have been to confine the prohibition to that *species of executions* in which a seizure and sale ordinarily take place. The concluding words of the 34th section, which provide that any person to whom any sum of money may be due in respect of any such warrant of attorney, or cognovit actionem, shall be a creditor under the act, seem to remove all doubt as to the meaning of the section, because there is no execution of any kind which an individual creditor can take out consistently with his being a creditor under the act. In *Groves v. Cowham (a)*, the Court say, that the statute is a supersedeas of any execution.

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*Harrison*, in reply, was stopped by the Court.

LORD DENMAN, C. J.—Upon the last point the argument presents many difficulties. The Court will therefore take time to consider of it.

Third point :  
As to operation of s. 34.  
Cur. adv. vult.

With regard to the other point: the eleventh and the twenty-eighth sections must be read together, and reading them together, it seems to me quite clear that the income of an insolvent clergyman does not pass to his assignee by the assignment. The first branch of the 28th section enacts, that nothing in the act shall extend to entitle the assignees of any prisoner, being a beneficed clergyman, to the income of such benefice. Then the second branch gives the assignees this privilege, that they may “apply for and obtain a sequestration of the profit of any such benefice for the payment of the debts of such prisoner, and the order of adjudication shall be a sufficient warrant for the granting such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of *levari facias*, founded upon any judgment against such prisoner.” That must, I think, mean—subject to any

First point :  
Operation of  
ss. 11 and 28.

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writs which have priority of execution. The execution creditor may retain that of which he has obtained possession before the right of the assignees comes into operation. It is quite clear, therefore, in my opinion, that the rule in the case of *Bishop v. Hatch* must be discharged.

First point.

LITLEDAL, J.—The question whether the assignees derive any title to the insolvent's benefice under the general assignment, seems to me perfectly clear. The first proviso in the 28th section is clearly an exception to the general assignment clause; but the legislature, not intending altogether to deprive the assignees of an insolvent clergyman of the income of his benefice, provides, in the subsequent part of the section, that when the adjudication has taken place, they shall be in the place of execution creditors,—which is done by making the adjudication a sufficient warrant for the granting of a sequestration, without any of the ordinary proceedings to authorize the same.

First point.

PARKE, J.—I certainly never felt any doubt on this part of the case, either now or upon the former argument. The 11th and the 28th sections must be read together. By the former part of the 28th section it is provided that the fruits of any benefice are not to pass to the assignees by the assignment. The claim of the assignees must therefore rest on the latter part of the clause, and by that part of the section the assignees are put in the situation of execution creditors, liable, consequently, to priority of execution. There are no words which import that the assignees are to have a priority of execution. The assignees stand in the same situation as if the order of adjudication was a judgment. Considering the difficulties which attend the doctrine of relation in any case, it is not advisable to favour such a construction of this act as would introduce that doctrine here, unless the words of the act are express.

First point.

PATTESON, J.—When this case was argued in last Mi-

chaelmas term, I was much struck with the argument that unless the assignees had a right to the income, the policy and the obvious intention of the act would be entirely frustrated; for the insolvent is obliged to give notice to all his creditors of his intention to take the benefit of the act; so that the judgment creditors in fact receive notice to come in and defeat the claim of the general creditors. I was therefore anxious to find something in the act to favour the claim of the assignees. The 11th section, if it gives the assignees any interest in the benefice of an insolvent clergyman, either conveys the absolute property in the benefice, or the right to the income. If it passes the latter, its operation is curtailed by the 28th section. If it gives the *property* in the benefice, the 28th section is absurd, because that gives the *income* upon particular terms. It would be absurd to say that a party should have the income of a benefice except in a certain way, if he had already the property. I am obliged to submit to give this decision; I give it with great reluctance, but I cannot get over the words of the act. The legislature ought to have provided for this case.

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In *Bishop v. Hatch* . . . Rule discharged.

In *Chuter v. Same* . . . *Cur. adv. vult.*

On a subsequent day in this term the judgment of the Court, in *Chuter v. Hatch*, was delivered by

Lord DENMAN, C. J.—We do not think it necessary to give any opinion as to whether the bishop should have been made a party to the rule; because upon the other point discussed in this case, we are of opinion that the rule should be discharged. Formerly there were no means by which the assignees of an insolvent clergyman could get at his spiritual property. By the 27th section (a) of 53 *Geo. 3*, c. 102,

(a) Which provided that it should be lawful for the assignees of an insolvent clergyman to apply for and obtain a sequestration of the profits of the clergyman's benefice for the payment of his debts,

Second point.  
  
  
  
  
  
  
Third point.



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the assignees are empowered to issue out a sequestration founded upon the adjudication. The same power is given by 7 *Geo.* 4, c. 57, s. 28.

This power being given by act of parliament, must be confined strictly to the terms of the act. The sequestrations of the assignees are, we think, *subject to all former sequestrations*. It was objected that the execution was void by the 34th section, because it was founded on a judgment entered up on a warrant of attorney. The language of the 34th section cannot by possibility include a sequestration, since it only renders unavailable executions *by seizure and sale*, and in the case of a sequestration there is *no seizure and sale*.

Rule discharged.

against which he should have obtained a discharge under that act; and that the order for such discharge should be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the

same, and that such sequestration should accordingly be issued as the same might have been issued upon any writ of *levari facias* founded upon any judgment against such clergyman.

### BRICE v. WILSON (a).

An executor, who gives no orders for the funeral of his testator, is liable only to the extent of the expenses of a

funeral suitable to the rank and circumstances of the testator.

And it seems that he is not liable at all where the funeral is ordered by another person, to whom the undertaker gives credit.

A testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant. The undertaker, in his bill, charged the widow, but subsequently applied for payment to the executor, who promised to pay. An action was brought against the executor in his own right, in which he suffered judgment by default:—Held, that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow.

**ASSUMPSIT** for goods sold and delivered, and for work, labour and attendance by the plaintiff, as an undertaker of funerals, done, performed and bestowed by the plaintiff and

(a) This case was decided in last Hilary term.

his servants about the funerals of certain persons (a), deceased, at the request of the defendant, and for divers horses, coaches, hearses, &c. used in conducting the funerals by the plaintiff for the defendant, at his request, and for divers fees and sums of money paid by the plaintiff in respect thereof for the defendant, and at his request.

The defendant suffered judgment by default; and upon the execution of a writ of inquiry before the under-sheriff of Middlesex, on the 20th of last December, the jury assessed the damages at 52*l.* 4*s.* 7*d.*

*Butt*, in the early part of this term, obtained a rule to shew cause why the inquisition taken upon the execution of the writ of inquiry should not be set aside, and a new writ of inquiry issued and executed, upon an affidavit which stated as follows:

This action was brought against the defendant, who is executor of *David Windsor*, deceased, in his individual capacity, to recover the amount of the plaintiff's charges for the funeral of the said *David Windsor*, a farmer, who, in January, 1833, died insolvent. The defendant attended the funeral as a mourner, not having previously given any orders for it, nor being at all acquainted beforehand with the arrangements that had been made. From the notes of the under-sheriff, which the affidavit verified, it appeared that the evidence given upon the execution of the writ of inquiry was to the following effect:

The plaintiff received orders for conducting the funeral from Mrs. *Windsor*, the widow of the deceased, through her brother, Mr. *Mills*, to whom also, about a month after the funeral, the plaintiff delivered the bill, charging Mrs. *Windsor* as the debtor. Orders for funerals are rarely given to the undertaker by the executor, but generally by some

(a) The particulars of the plaintiff's demand contained charges for the funeral of a child, in addition to those made for the funeral of Mr. *Windsor*. At the trial, however, the claim against the defendant in respect of the funeral of the child seems to have been abandoned,

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member of the family or by the nurse. It was unexpectedly discovered after the funeral that the testator had died insolvent, and a meeting of creditors took place. The funeral was considered by the witnesses an extravagant one for a person of the testator's rank and circumstances, but the charges, which altogether amounted to 52*l.* 4*s.* 7*d.*, were fair. The defendant, upon attending the funeral as a mourner, was furnished with gloves and a hat-band, in the same manner as the rest of the mourners, and did not appear to have then objected to the expensiveness of the funeral. The defendant, at a time subsequent to the delivery of the bill to *Mills*, said to the plaintiff's sister, who assisted him in conducting his business, that he was glad the plaintiff had not been at the meeting of creditors, and that he would pay the bill soon. Two letters, the one written by the defendant and the other by Mr. *Watson*, his attorney, and both addressed to the plaintiff, were put in and read. The first was as follows :

" London, 13th May, 1833.

" Dear Sir,—In reply to yours of the 10th instant, I am sorry that at present it is not in my power to place at your disposal the sum total of your account. I would have (according to promise) transmitted you 25*l.* on account; but as it is in contemplation to liquidate the whole of the funeral charges in the early part of July next, I prefer waiting till that time to the payment of any part by instalments. Consequently I sincerely trust that this arrangement will not inconvenience you, being an arrangement more congenial to my feelings than paying on account. I hope to see you at Hemel Hempsted. I am, &c.

John Wilson."

The second was as follows :—

" Gerard Street, 29th June, 1833.

" *Re Windsor*, deceased.

" Sir,—In answer to yours of the 25th inst., I beg to inform you, that although you may rest perfectly satisfied that you will be paid, yet from the state of Mr. *Windsor's*

affairs, we shall not have funds in hand until the end of July or beginning of August, when your claim shall be immediately satisfied.

I am, &c.

John Watson."

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The defendant's counsel contended before the under-sheriff, that the defendant (not having ordered the funeral) was only liable to such an amount as was reasonable for a person in the testator's station in life, and which he, the defendant, would be entitled to charge against the specialty and other creditors of the estate. But the under-sheriff told the jury that the defendant was liable to all the expenses of the funeral, and directed them to find for the whole amount claimed in respect of the testator's funeral, if they thought the charges reasonable. The jury returned a verdict for the plaintiff, damages 52*l.* 4*s.* 7*d.*

Against the above rule nisi, cause was shewn in the course of the same term, in the Bail Court (a), before *Patteson, J.*, by

Charles Turner, for the plaintiff. The defendant, by suffering judgment to go by default, has admitted the cause of action. If a defendant suffers judgment by default in an action upon a bill of exchange, the bill is admitted, and upon the execution of a writ of inquiry, the only purpose for which the bill is in such case required to be produced is, that it may be seen whether any part of the amount has been paid. By suffering judgment by default, in an action for goods sold and delivered, the defendant, according to *Buller, J.*, in *Green v. Hearne* (b), only admits that *something* is due; but this must be understood to mean, that though the defendant admits the plaintiff's right to recover in respect of all demands that come within the scope of the declaration, he does not admit the correctness of the charges in point of amount: *De Gaillon v. L'Aigle* (c).

(a) The editors were favoured with notes of the arguments by the counsel in the cause.

(b) 3 T. R. 302.

(c) 1 Bos. & Pul. 368.

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Here the reasonableness of the charges *in point of amount* was expressly found by the jury. The circumstances of the orders for the funeral having been given by Mrs. *Windsor*, and of the plaintiff's having sent his bill to her, and in it treated her as his debtor, do not affect the defendant's liability; for he has, by suffering judgment by default, adopted Mrs. *Windsor's* acts. If the defendant had meant to deny his responsibility beyond a limited amount, he should have pleaded the general issue, and have paid such amount into Court.

But it is contended that the defendant is liable only upon an implied contract as executor, *Rogers v. Price(a)*; and that as the testator died insolvent, the implied promise would be limited to such a reasonable amount as would be allowed to the executor as against creditors of the testator: *Hancock v. Podmore(b)*. If the defendant had in this action been sued in the character of an executor, and there had not been assets, this argument might have applied. Here, however, he is sued in his individual capacity, and has suffered judgment by default, which, indeed, would have been an admission of assets so as to have bound him to the full extent, even if he had been sued as executor. *Schwyn's N. P.*, 5th edit. 779. The defendant, at the time of adopting the acts of Mrs. *Windsor* and promising to pay, does not make any objection that the funeral was conducted on too extravagant a scale.

First point:
Contract not
with defend-
ant, but with
third person.

Butt, in support of the rule. First, The funeral in this case was not ordered by the defendant, but by another person. The extent, therefore, of the executor's liability is that amount which he would be entitled to retain against the creditors of the estate; in other words, to the reasonable charges for the funeral, regard being had to the *condition* of the testator. *Hancock v. Padmore* is an authority that, as against a creditor, 20*l.* for the funeral of a person

(a) 3 Younge & Jervis, 28.

(b) 1 Barn. & Adol. 262.

in the testator's rank of life would be the utmost that the law would allow. An executor, where he has assets, is liable to the expenses of a decent funeral, even though the testator be buried without his authority: *Rogers v. Price*. But that implied liability is only to the extent of a suitable funeral, and for such an amount as he might charge against creditors in the distribution of the assets of the estate; and *that*, in the present case, would be 15*l.* or 20*l.* The cases as to an executor's *implied* liability are collected in 2 *Williams on Executors*, 1099 to 1101.

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2ndly. The liability of the defendant is not extended by his suffering judgment by default. He was liable, it must be admitted, to the reasonable charge for the funeral; but by letting judgment go by default on a declaration containing the common counts only, a defendant only admits that *something* is due. It has been suggested that the reasonable amount might have *been paid into Court* under the general issue; but that would not have altered the defendant's situation. The legal effect of paying money into Court under the common counts, and of suffering judgment by default on a declaration so framed, is the same. In the one case it is only an admission to the extent of the money paid in; in the other, an admission merely that a contract was made, and that something was due to the plaintiff. *Seaton v. Benedict* (a), *Meager v. Smith* (b).

Second point:
 Effect of judgment by default.

Then 3dly. The legal situation of the defendant is not altered by the letters promising to pay the plaintiff's bill. Assuming that the defendant (who did not make the contract) was previously only liable to the extent of the reasonable charge for the funeral, the letters did not extend his liability. There is no consideration in the letters for a promise to pay any thing which he was not before legally bound to pay. A promise by an executor, without assets, is *nudum pactum*; and in the present case the plaintiff, in order to raise the question, should have declared *specially*.

Third point:
 Effect of express promise.

(a) 2 Moore & P. 76.

(b) *Ante*, vol. i. p. 449; 4 Barn. & Adol. 673.

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There was nothing to shew that the widow, who ordered the funeral, acted as the agent of the executor; and it was not pretended on the other side that such was the case. If then the defendant, under these circumstances, is to be charged with the amount found by the jury, he will be made *personally* answerable, without any act or contract of his own, for the difference between that sum and the amount which the law allows, as against creditors, for a suitable funeral.

Cur. adv. vult.

On the last day of Hilary term judgment was delivered in this Court by

PATTESON, J.—This was an action of indebitatus assumpsit, brought by the plaintiff against the defendant in his own right, for the expenses of the funeral of a person of the name of *Windsor*, to whom the defendant was executor. The defendant suffered judgment by default; and on the execution of a writ of inquiry before the under-sheriff, it appeared that the funeral had been ordered by the widow of the testator, who was not an executrix. The defendant attended the funeral, and did not then make any observations as to its being too expensive. He, being executor, was, it appears, afterwards applied to for the amount of the expenses of the funeral by a letter, to which he replied by a letter dated May 13th, and which was produced at the inquiry. And it appears that another application was made in the latter part of June, to which he answered by his attorney, who wrote to the plaintiff a letter dated 29th June, which was also produced in evidence. From these letters it is perfectly clear that there was here an express promise on the part of the defendant to pay the plaintiff's demand. It was contended before the under-sheriff, and again here, that the defendant was only liable upon an implied promise to the extent to which a funeral, suited to the rank and circumstances of the deceased, would have amounted. It has been decided, by several cases, that an

executor is liable upon an implied promise, at common law, to pay reasonable expenses for the funeral of his testator, where no other person is liable upon an express contract, although he does not give orders for it. But there is no case which goes the length of deciding that if the funeral be ordered by a person to whom credit is given, the executor is liable at law. Here, the funeral was certainly ordered by *Mrs. Windsor*; and it would seem that credit was originally given by the plaintiff to her, and not to the executor. If therefore the case had rested merely on the common law liability of the defendant as executor, he might have answered that he was not liable beyond 20*l.*, as being the extent of the expenses of a reasonable funeral for a person in the circumstances in which the testator was, and as being the utmost amount which he would be allowed as against the creditors of the insolvent testator's estate. But it seems to me that the defendant, by all that he has done, has adopted the acts of the widow, and has treated her as his agent, and has thus rendered himself liable; and as he has suffered judgment by default in this action, he has rendered himself liable to the whole amount. I think therefore that the plaintiff is entitled to recover, not on the ground of a common liability of the defendant as executor, but on the ground of his having expressly rendered himself so. Under these circumstances, I think it clear that the direction of the under-sheriff was right, and that the rule must be discharged.

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Agency by
adoption.

DENMAN, C. J.—I think it right to say, that having heard the arguments upon the application for this rule, I entirely concur in the view of the case which has been taken by my brother *Patteson*.

LITLEDALE, J. and TAUNTON, J. also concurred.

Rule discharged.

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CHILD v. CHAMBERLAIN, BOND, JESSOPP, and
four others.

There is no statutory limit to the amount of the costs and charges for levying and impounding a distress for rent above 20*l.*, where it is impounded on the premises by virtue of 11 *Geo.* 2, c. 19, s. 10.

The 57 *Geo.* 3, c. 93, regulating the costs and charges for levying and disposing of a distress for rent under 20*l.*, does not apply to a case of a distress taken for more than 20*l.*, though made upon goods which are appraised at, and sold for, less than 20*l.*

TROVER for furniture, &c. with nine other counts, in case. The tenth count charged, that the defendants pretending that 45*l.* 18*s.* was due from the plaintiff to *Chamberlain*, for the rent of certain tenements, wrongfully seized, took and distreined the goods and chattels of the plaintiff, as a distress for the supposed arrears of rent. Yet the defendants not regarding the form of the statute &c., but contriving &c., took from the plaintiff a large sum of money, to wit, 1*l.*, as and for impounding the said distress, being greater than the sum of 4*d.* allowed by the statute. Plea: not guilty. At the trial in Hilary term, before *Parke*, J., in the Bail Court, it appeared as follows:

The action was brought to recover damages for alleged injuries connected with a distress for 45*l.* 18*s.* for rent, made by *Bond* on behalf of *Chamberlain*. The goods distreined were not impounded off the premises, but were left there in the possession of *Jessopp* by *Bond*. After having been appraised at 17*l.* 12*s.*, and condemned by the three other defendants, they were removed from the plaintiff's premises to an auction room, where they were sold for 18*l.* 18*s.* The charges claimed from the plaintiff for the levy and keeping possession, were as follows:

“ Broker's charges.

Levy	£ 2 5 0
Man in possession seven days	1 4 6”

It was contended on the part of the plaintiff, in support of the tenth count, that this case came within the provisions of 1 & 2 *Phil. & Mary*, c. 12, s. 2, which provides that no person shall take for keeping in pound, impounding, or poundage of, any manner of distress, above the sum of 4*d.* for any one whole distress that shall be impounded, under a penalty of 5*l.* The learned judge was of opinion that there was not in this case any charge for keeping in pound,

impounding, or poundage of a distress, within the meaning of the statute, but directed the jury to find a verdict for the plaintiff upon this count, if they thought the charges excessive. The jury found a verdict for the plaintiff, with one farthing damages, and the learned judge gave the plaintiff leave to move to enter a verdict for the difference between the sum taken and that allowed *by the statute*. The proof having failed upon all the other counts, the verdict upon them was for the defendants.

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Dunbar in the same term moved according to the leave granted. The question upon which leave was given to move the Court was, as to what was to be deemed a *poundage* within the meaning of 1 & 2 *Phil. & Mary*, c. 12, s. 2; and it is now submitted that this is a case within the act, and that the plaintiff is entitled to recover the difference between 4*d.* and the sum of 3*l.* 9*s.* 6*d.*, being the 2*l.* 5*s.* for the levy and 1*l.* 4*s.* 6*d.* for the man in possession. As long as the goods distrained continue in the custody of the law they are *in pound*, whether removed from the premises or not. By 57 *Geo.* 3, c. 93, s. 2, (referring to the schedule,) it is enacted, that no person shall take or receive, or retain out of the produce of goods sold under a distress for the payment of rent, any greater costs and charges than 3*s.* for levying the distress, and 2*s.* 6*d.* per day for the man in possession. This distress may be said to come within the act of 57 *Geo.* 3, although that act applies only to distresses for rent not exceeding 20*l.*; for where there are no visible means of obtaining by the distress more than 20*l.*, as was the case here, the distress can hardly be said to have been made for a greater amount of rent. There is however no act, except that of 1 & 2 *Phil. & Mary*, which applies in this respect to distresses for rent *exceeding* 20*l.*

Lord DENMAN, C. J.—We will see my brother *Parke* upon the point.

Cur. adv. vult.

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LORD DENMAN, C. J., in the course of the term, said,—  
 We are of opinion that there should be no rule. At the time of passing the act of 1 & 2 *Phil. & Mary*, c. 12, distresses could not be impounded on the premises; therefore the provisions of the second section of that act could apply only to the case of a distress removed from the premises and impounded elsewhere. Until the passing of 2 *W. & M.* seas. 1, c. 5, goods taken by way of distress, and impounded off the premises, could not even be sold. That act authorizes their sale; and the subsequent act of 11 *Geo. 2*, c. 19, s. 10, authorizes any person lawfully taking a distress for rent, to impound or otherwise secure the distress so made, in the most fit and convenient part of the premises chargeable with the rent, and to appraise, sell, and dispose of them upon the premises, in like manner as any person might then do off the premises by virtue of the act of 2 *W. & M.* In this case, the distress was made under the statute of 11 *Geo. 2*: we think, therefore, that the restriction in the statute of *Philip & Mary* does not apply to this distress; the more so, as by the 57 *Geo. 3*, c. 93(a), it is provided, that for a distress for rent *under 20L.*, no more shall be charged than certain sums, much exceeding the sum mentioned in the old statute. This is not a distress for rent *under 20L.*, and it therefore does not come within the restriction of *that* statute.

Rule refused.

(a) The regulations of this act, with respect to the costs and charges of levying and disposing of distresses, where the sum demanded is under 20L., applying only to distresses for rent, are extended by 7 & 8 *Geo. 4*, c. 17, (as far as the same are applicable and capable of being put in execution,)

to any distress or levy to be made for any land-tax, assessed taxes, poor-rates, church-rates, tithes, highway-rates, sewer-rates, or any other rates, taxes, impositions, or assessments whatever, in all cases where the sum demanded and due for or in respect of such rates, &c. shall not exceed 20L.



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TATE v. CHAMBERS, Esq.

**TRESPASS** and false imprisonment. Plea: not guilty. At the trial before *Tindal*, C. J., at the Surrey spring assizes, 1832, the following facts appeared:—

In August, 1828, the plaintiff lent to *Dougan* 6*l.*; as a security for which, and for a rent of 4*s.* a week for the hire of a room in which the goods were to be kept, *Dougan* deposited with the plaintiff certain household furniture. A dispute having subsequently arisen between them respecting this furniture, *Dougan* applied at the Union Street Police Office, Southwark, for a summons, and obtained from Mr. *Chambers*, the defendant, one of the magistrates at that office, a summons requiring the plaintiff's attendance on the 2d of April, 1831. Upon the appearance of the plaintiff in obedience to this summons, there was a disagreement between him and *Dougan* as to the amount which the latter was to pay to the plaintiff. Mr. *Chambers* endeavoured to prevail upon the parties to settle the matter, but *Dougan* refusing to pay the plaintiff the amount claimed by him, the plaintiff would not deliver up the goods. *Dougan* then made oath to a written information, that he believed the goods to have been illegally pawned or disposed of by the plaintiff. Mr. *Chambers* allowed the plaintiff to leave the office on that day upon his own recognizance to appear at a subsequent day, in case the matter were not previously arranged between them. On the following Saturday the parties attended again at the police office, and upon that occasion Mr. *Chambers* again desired the plaintiff to give up the furniture upon payment of a certain sum; and upon his refusal to do so, adjourned the hearing of the case until the following Monday, and required the plaintiff to find two housekeepers as bail in 40*l.* each. The plaintiff, not being able to procure bail, was committed for further examination until the following Monday, and in the meantime was

*A.* having deposited with *B.* certain goods as a security, a dispute arises concerning the goods, upon which *B.* obtains from *C.*, a police magistrate, a summons requiring *A.*'s appearance on a day named. Upon the appearance before *C.*, *B.* makes oath to a written information, that he believes the goods to have been illegally pawned or disposed of by *A.* *C.* gives a further day to the parties, when, after evidence being gone into, *C.* commits *A.* for re-examination on a charge of suspicion of having unlawfully disposed of the goods of *B.* Held: that the charge was not sufficiently made so as to give the magistrate jurisdiction over the matter, under the 8th section of the Pawnbrokers' Act, (39 & 40 Geo. 3, c. 99.)

Whether in a case upon this statute, properly brought before a magistrate, the party may be committed for re-examination, *quære*.

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carried to prison. The warrant of commitment for re-examination recited that the plaintiff had been brought before Mr. *Chambers* "and charged, on the oath of *William Dougan*, on *suspicion* of having, in the month of November, 1828, at &c. unlawfully disposed of six chairs, some pictures, and other property entrusted to his care, of the goods and chattels of *Dougan*, against the statute &c." On Monday the plaintiff was brought up and discharged by Mr. *Chambers*, who said that he had acted upon a wrong view of the case.

The learned judge, in his charge to the jury, said, that the question for their consideration was, whether a charge had been made upon oath against the plaintiff to bring the case within the jurisdiction of the magistrate; that if there was such charge, whether it were true or false, the defendant, as a magistrate, had a right to commit for further examination; that if the defendant acted under 39 & 40 *Geo.* 3, c. 99, s. 8, (the Pawnbrokers' Act,) he was not justified in the course he had taken, as the proceeding under that act would have been for a *penalty*; but that if the evidence given before the defendant shaped itself into a case of *embezzlement* under 7 & 8 *Geo.* 4, c. 29, ss. 49, 57, the defendant had a right to commit, and was entitled to a verdict.

The jury found a verdict for the plaintiff.

In Easter term 1832, a rule nisi for a new trial was obtained by *Law*, against which, in Hilary term 1833,

*Platt* shewed cause. If this rule be made absolute the county magistrates will be armed with an arbitrary power. The question is not whether the magistrate has, in such a case as this, a right to commit a person *convicted*, but whether he may commit *for re-examination* upon the mere colorable statement of a party. The committal was made with a view to cause the party to come to a settlement according to the recommendations of the magistrate. It was merely upon an oath of *suspicion*. When the plaintiff

was brought to the office on Monday, no additional evidence was produced against him, and he was released. There was no charge made upon oath sufficient to bring the case within the jurisdiction of the magistrate, so as to warrant him in committing the plaintiff.

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*Platt* was here stopped by the Court.

*Law, C. S. and Thesiger*, in support of the rule. The committal was justified under the 8th section of the Pawnbrokers' Act. It was never contended that it was so under the 7 & 8 *Geo. 4*, c. 29, which is an act relating to misdemeanors punishable with transportation. The Lord Chief Justice left it to the jury, that if the magistrate acted under the Pawnbrokers' Act, he was not justified in committing. Whether this is so or not, is a question of importance. It is contended that under the 8th section of that act the magistrate is empowered to commit for re-examination. That clause enacts, that in case any party shall knowingly and designedly pawn, pledge, or exchange, or unlawfully dispose of, any goods, &c. of any other person, not being employed or authorized by the owner so to do, a justice may grant his warrant for the apprehension of such offender; and if he be convicted upon the oath of a credible witness or witnesses, or by his own confession, he shall forfeit for every such offence any sum not exceeding 5*l.* nor less than 20*s.*, and also the full value of the goods &c., so pawned &c., such value to be ascertained by such justice; and in case such forfeiture shall not be forthwith paid, the justice may commit to prison for the space of three months, unless the forfeiture be sooner paid. The power of committal for re-examination is not the subject of any particular statute, but is drawn by *inference* from the statutes of *Philip & Mary (a)*. It was stated by the learned Chief Justice, at the trial, that a magistrate had power to commit for *re-examination* in those cases only in which he had power to commit for *trial*. A magistrate certainly has a power of

(a) 1 & 2 *Ph. & M. c.* 13; 2 & 3 *Ph. & M. c.* 10.

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committal for re-examination where he may commit for trial, but not in those cases *only*. Where a party is accused of an offence, and is brought before the magistrate by virtue of a warrant, he is, during the period of examination, in custody. Is it necessary that the magistrate should come to a decision *in one day*, and that the examination should be concluded *at one sitting*? It may be for the benefit of the accused that the case should be postponed. If a *prima facie* case be made out against him, he obtains, by the postponement, an opportunity of collecting evidence and removing the unfavourable impression created against him. [*Derman*, C. J. A party seeking the aid of a magistrate in a matter that does not concern the public, should come prepared in the first instance with the whole evidence; and if the evidence be not sufficient, the defendant should be discharged at once.] There was a case for conviction on the first day, and the commitment for re-examination was the postponement of the trial. Lord *Hale* says (*a*), "Regularly in all offences, either against the common law or acts of parliament, that are below felony, the offender is bailable unless he hath judgment, or that by some particular or special act of parliament bail is ousted." From this passage it may be collected, that in cases clearly short of felony a party may be bailed for trial; and if for trial, then also for re-examination. Where a party is *bailable*, he may, in default of bail, be *committed*. In this case the party, upon adjournment, was directed to give bail, but not being able to procure it, he was committed.

Lord *Hale* also says (*b*), "And in order thereunto, if by some reasonable occasion the justice cannot, at the return of the warrant, take the examination, he may by word of mouth command the constable, or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination; and this detainer is justifiable by the constable, or any other person, without shewing the particular cause for which he

(*a*) 2 Hale, P. C. 127.

(*b*) 1 Hale, P. C. 585.

was examined, or any warrant in scriptis; T. 37 Eliz. Rot. 244, *Broughton and Marshaw*." This is cited to shew that the power of commitment is not expressly the creature of the statutes of *Philip & Mary*, but is a necessary consequence of them. The power of commitment for re-examination is here spoken of as the continuation of the custody under which a defendant is brought. Under the 8th section of 39 & 40 Geo. 3, persons may be detained until the case is finished, upon the same principle that a party may be committed for re-examination in cases of felony. There are many cases in which the magistrate may be bound to adjourn before the case is finished, and if bound to adjourn, he must in such case have power to commit for re-examination. Under the Pawnbrokers' Act the magistrate is empowered to issue his warrant for the apprehension of the offender, and if this be done the party comes up in custody of the constable, and must continue so during the whole of the examination. Here, it is true, no warrant was actually issued; but that circumstance does not materially alter the features of the case. If the magistrate has authority under the act in a particular case, and bonâ fide thinks that the case before him is within his authority, it is quite clear that he will not be subject to an action of trespass. Here the magistrate was acting bonâ fide. It appeared to him that from the information, in conjunction with the evidence produced, a sufficient case was made out to warrant the committal. If in this the magistrate's judgment was erroneous, he is not answerable. The principal point made at this trial was, that as the whole matter would end in a *fine*, upon payment of which there would be no power to punish by commitment, the case was different from one in which the final punishment would be imprisonment. The circumstance of the punishment by commitment to prison being avoidable by payment of the fine imposed, cannot take from the magistrate the power which he would have in the other case, of committing for re-examination; *Bennett v. Watson* (a). [*Little-*

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(a) 3 Maule & Selw. 1; see also 2 Hale, P. C. 123.



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*dale, J.* If in the case of a misdemeanor, a man may be committed for re-examination, that means a misdemeanor for which he may be *indicted*. This is a proceeding entirely under the statute.]

No question can here be raised as to the length of time for which the plaintiff was committed. From Saturday until Monday is not an unreasonable period; *Davis v. Capper (a)*, *Broughton v. Mulshoe (b)*, *Tresham v. Ford (c)*.

*Cur. adv. vult.*

The judgment of the Court was subsequently delivered by

DENMAN, C. J., who, after stating the facts of the case, proceeded in substance as follows:—

It was admitted on the argument that the provisions of the Embezzlement Act could not apply in this case; but the point contested was, whether, upon an adjournment of the case for the purpose of obtaining further evidence, the 8th section of the Pawnbrokers' Act gave the magistrate power to commit for re-examination. The magistrate can have *no jurisdiction* under that act unless the party be charged with having knowingly and designedly pawned pledged or exchanged, or unlawfully disposed of, the goods and chattels of some other person. Now no charge within the words of the statute was ever made by *Dougan*, or by any other person on his behalf. Originally there was no information, and that to which *Dougan* made oath upon the first appearance of the parties, was only an information that he *believed* the goods to have been illegally pawned or disposed of by the plaintiff. The case was, therefore, never properly brought before the magistrate. Our decision, it will be understood, leaves untouched the question as to the right of a magistrate to commit to prison for re-examination in a case such as the present.

Rule discharged.

(a) 5 Mann. & Ryl. 53; 10 Barn. & Cress. 28.

(b) Sir F. Moore's Rep. 408.

(c) Cro. Eliz. 830.

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BLANEY v. HOLT, }  
BLANEY v. FARDELL, } Bail of MORGAN.

THE facts of these cases and the argument are so fully stated in the judgment, that it is unnecessary to repeat them (a).

Special bail in an action in this Court by bill were liable to the amount of debt and costs recovered, such amount not exceeding double the sum sworn to.

DENMAN, C. J., delivered the judgment of the Court, as follows:—

An application was made by Mr. *Platt* to set aside an order of Mr. Justice *Littledale*, for staying the proceedings on a recognizance of bail, on payment of the sum of 60*l.*, being the amount of the recognizance of the bail in an action of *Blaney v. Morgan*, together with the costs of those actions. There is probably some mistake in saying that 60*l.* is the amount of the recognizance, the words of the order should probably have been *double the sum sworn to*, because if there was a sum certain mentioned in the recognizance, there would be no ground for Mr. *Platt's* application, which is made on the ground that there is no sum certain mentioned in the recognizance. The proceeding against the original defendant was by bill, and Mr. *Platt* contended that as the form of the recognizance is that the bail should pay the condemnation money and costs, in general terms, the bail could not be relieved but on payment of the sum sworn to, and the whole of the costs; but he admitted that if the proceedings had been *by original*, then, as the bail are bound in a sum certain, and which is double the sum mentioned in the affidavit, they would not in any event be liable beyond that amount. In the Common Pleas they are each liable to that extent. We have no distinct account how the difference arose in the form of the recognizance *by bill*. It might be connected with the old course of the Court as to bail by bill, which was, that they are liable to the full extent of the damages in all the actions that should be brought against them by the same plaintiff in the same

(a) This judgment was delivered in last Trinity term.

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term. And though the entry in the recognizance of bail is "in placito prædicto" only, yet by that entry he seems to have been considered to be subject to all actions in the same term, by the same plaintiff against the same party, though not at the suit of a stranger. This practice was found productive of so much inconvenience that a rule of Trinity term, 22 *Car. 2*, was made to limit the responsibility of the bail; and by another rule of Easter, 5 *Geo. 2*, the bail are to be liable only for so much as is indorsed on the process, or for any smaller sum which the plaintiff may recover. The last rule itself is silent as to costs, but in a note to the rules of the edition of 1742 (and the notes to that edition are considered as authority as to the practice), there is added "together with costs of suit." Several cases have occurred since to the same effect, which it is not necessary to notice, until we come to *Jacob v. Bowes* (a), where what we have just mentioned is stated as the practice, as to the sum sworn to and the extension of the rule to costs. That, however was by original, but the Court say that there is no difference in practice between the two modes of proceeding. And the question is, what is to be the amount of the costs? whether the whole costs, however great, or whether they are to be limited; so as that upon the whole the bail shall not be liable to more than double the sum sworn to. And we think that it is to be limited, so that the bail shall not be liable to more than double the sum sworn to. It would be singular that the bail should incur a greater or less degree of liability, according as the action was commenced by bill or by original. The bail, if opposed, justify in both cases in double the sum sworn to, and they can never contemplate a different degree of liability in the two cases. The plaintiff looks for the same sum in each case, and he cannot require that they should justify in a greater sum in one case than in the other. The bail *to the sheriff* are not liable to more than the penalty of the bail bond, whether the proceedings are by bill or by original. Their obligation is for the appearance of the defendant, which is not his

(a) 6 East, §12.

personal appearance, but his putting in and justifying special bail. The liability of *these* bail ought to be the same as the bail to the sheriff, who undertook to put them in. If the bail to the sheriff themselves become the special bail, it cannot be supposed that they incur a greater liability than that which they contracted to the sheriff. In *Gass v. Drakefield*, bail of *William Harrison* (a), there is the following note—with a *semble*: “Where the bail are let in upon terms to try the cause of the principal, the money levied to abide the event and the bail bond to stand as a security, the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security when the bail was first let in to try upon terms.” We think that case rightly decided even without the intervention of the *semble*, the reason for which *semble* must have been the particular undertaking of the bail; for if an action was brought on the bail bond itself, the bail could not be liable beyond the amount of the penalty.


We however advert to a case of the *Duke of York v. Pilkington* (b), in 34 *Car. 2*, where it was held, that the special bail might be liable to greater amount than the bail to the sheriff. That might be so according to the ancient practice of the Court, that in a proceeding by bill the bail were liable to any extent; but this case does not appear to have been rightly decided, as it was after the rule of Trinity term, 22 *Car. 2*, which was probably not brought to the attention of the Court. Where the sheriff has to put in special bail, his bail, in the same manner as the bail to the sheriff, relieve him by justifying in double the sum sworn to; and if an attachment be obtained against the sheriff for not bringing in the body, or in other words, not justifying special bail, he is not liable beyond the penalty of the bail bond and the costs of the attachment; *The King v. Sheriff of Middlesex* (c). That, indeed, was a

(a) 2 Smith's Rep. 354.

(b) Skinner, 70.

(c) 3 East, 604.

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proceeding by original, but the Court, who had taken time to consider, do not put it upon that distinction. And in *Jacob v. Bowes* (a), above cited, the Court said that there was no difference in practice, whether the proceedings were by bill or by original. That was not the same case as the present, but we refer to it as containing the general opinion as to the practice. We do not advert to any cases decided in the Common Pleas, because there the bail are bound in a sum certain. We are therefore of opinion that no rule should be granted. This case arises upon an action commenced before Easter term, 2 Will. 4. But the 21st of the new rules of Hilary term of that year, (and which rules are directed to commence on the first day of Easter term following,) directs that bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance; and probably, therefore, a question like the present may never arise again.

(a) 6 East, 312.

The KING v. The EDITOR of the SATIRIST.

Seemle, that an affidavit to found a criminal information for a libel published in England, upon a person being in parts beyond seas, may be sworn abroad.

ON the 30th day of January last, being the last day but one of Hilary term, Sir *James Scarlett* moved, on behalf of Lord *Charles Wellesley*, for a rule, calling upon the editor of the *Satirist* to shew cause why a criminal information should not be filed against him for a libel. It was stated that the libel was published in the *Satirist* newspaper, on the 23d of June, 1833; that Lord *Charles*, who was at that time abroad, knew of the libel in September, 1833, but that he did not return to England until the 22d of January following. It was admitted that, according to the ordinary rule (a) of the Court, the application was not within time, but it was con-

(a) Viz. that the party libelled cannot have a rule for a criminal information unless his application to the Court be made in the first term after knowledge, or so early

in the second term, as that the party complained of may have an opportunity of shewing cause against the rule within that term.

tended that where the party libelled was abroad at the time when the libel was published, or when the knowledge of its publication came to him, the case could not be considered as within the rule.

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Lord DENMAN; C. J.—Parties should be very prompt in making an application of this sort. We think, considering all the circumstances of the case, that there should be no rule.

It has been the persuasion that an affidavit cannot be made abroad (*a*), as a foundation for a criminal information. We think, however, that if that question should come under our consideration, such an objection would not prevail.

Rule refused (*b*).

(*a*) As to affidavits made abroad, see *O'Mealy v. Newell*, 8 East, 364; *Voght v. Elgin*, 8 East, 472; *Thurtt (Thuret) v. Faber*, 1 Chitt. Rep. 463; *Pickardo v. Machado*, 7 Dowl. & Ryl. 478, and 4 Barn. &

Cressw. 886; Tidd's Practice, 9th ed. 181; Mann. Exch. Pract. (Common Law,) 83.

(*b*) See *The King v. Jollie*, ante, vol. i. p. 483, and the note to that case.

MEMORANDA.

HILARY VACATION, 1834.

SIR THOMAS DENMAN, Knight, Lord Chief Justice of England, was created a Peer of the United Kingdom by the style and title of Baron *Denman*, of Dovedale, in the county of Derby.

Sir JOHN BAYLEY, Knight, retired from his office of Baron of the Exchequer. His lordship was appointed a Judge of the Court of King's Bench on the 9th May, 1808; he continued on the Bench of that Court until the 11th November, 1830, when he resigned that office and was appointed one of the Barons of His Majesty's Exchequer. Upon his retirement he was sworn of His Majesty's most honorable Privy Council, and was created a Baronet.

He was succeeded by JOHN WILLIAMS, Esq., one of His Majesty's Counsel learned in the law, who was called to the degree of the Coif, and gave rings with the motto "*Tutela Legum*," and afterwards received the honor of Knighthood.

Sir WILLIAM HORNE resigned his office of Attorney General, in which he was succeeded by Sir *John Campbell*, the Solicitor General; and *Charles Christopher Pepys*, Esq., one of His Majesty's Counsel learned in the law, was appointed to the office of Solicitor General, and received the honor of Knighthood.

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Sir JAMES PARKE, Knt., in the course of this Term resigned his office of Judge of this Court, and was appointed one of the Barons of the Exchequer.

Sir EDWARD HALL ALDERSON, Knt., resigned his office of Judge of the Court of Common Pleas, and was appointed one of the Barons of the Exchequer.

Sir JOHN VAUGHAN, Knt., resigned his office of Baron of the Exchequer, and was appointed a Judge of the Court of Common Pleas.

AND

Sir JOHN WILLIAMS, Knt., resigned his office of Baron of the Exchequer, and was appointed a Judge of the Court of King's Bench.

On the 25th of April, the following warrant was read in Court and entered on record.

WILLIAM R.

Whereas it hath been represented to Us, that it would tend to the general dispatch of the business now pending in Our several Courts of Common Law at Westminster, if the right of counsel to practise, plead, and to be heard, extended equally to all the said Courts; but such object cannot be effected so long as the Serjeants at Law have the exclusive privilege of practising, pleading, and audience, during term time, in Our Court of Common Pleas at Westminster: We do therefore hereby order and direct that the right of practising, pleading, and audience, in Our said Court of Common Pleas, during Term time, shall, upon and from the first day of Trinity Term now next ensuing, cease to be exercised exclusively by the Serjeants at Law, and that upon and from that day Our Counsel learned in the Law and all other Barristers at Law shall and may, according to their respective ranks and seniority, have and exercise equal right and privilege

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of practising, pleading, and audience in the said Court of Common Pleas at Westminster, with the Serjeants at Law. And We do hereby will and require you to signify to Sir Nicolas Conyng-
ham Tindal, Knight, our Chief Justice, and his companions, Justices, of Our said Court of Common Pleas, this Our royal will and pleasure, requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this Our purpose into effect.

And whereas We are graciously pleased, as a mark of Our royal favour, to confer upon the Serjeants at Law, hereinafter named, being Serjeants at this present time in actual practice in Our said Court of Common Pleas, some permanent rank and place in all Our Courts of Law and Equity; We do hereby further order and direct that Vitruvius Lawes, Thomas D'Oyley, Thomas Peake, William St. Julian Arabin, John Adams, Thomas Andrews, Henry Storks, Ebenezer Ludlow, John Scriven, Henry John Stephen, Charles Carpenter Bompas, Edward Goulburn, George Heath, John Taylor Coleridge, and Thomas Noon Talfourd, Serjeants at Law, shall from henceforth, according to their respective seniority amongst themselves, have rank, place, and audience in all Our Courts of Law and Equity, next after John Balguy, Esq. (a), one of Our Counsel learned in the Law. And We do hereby will and require you, not only to cause this Our direction to be observed in Our Court of Chancery, but also to signify to the Judges of Our several other Courts at Westminster, that it is Our express pleasure that the same course be observed in all Our said Courts. Given at Our Court of St. James, this 24th day of April, in the fourth year of Our reign.

To the Right Honourable

HENRY, LORD BROUGHAM AND VAUX,

Lord Chancellor of Great Britain.

(a) On whom that rank had been and who was now the junior King's
conferred in Trinity term 1833, Counsel.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

CUMBERLAND v. PLANCHÉ.

CASE for infringing the plaintiff's copyright in "The Green Eyed Monster," a farce. Plea: Not guilty. After issue joined, *Parke, J.*, (under 3 & 4 *Will.* 4, c. 42, s. 25,) ordered, by consent of the parties, that the facts should be stated for the opinion of the Court in the following case:—

The plaintiff is a bookseller and publisher in London. The defendant is the author of the farce in question, composed, printed, and published, within ten years before the passing of 3 & 4 *Will.* 4, c. 15, to amend the laws relating to dramatic literary property. (a)

(a) The first section of this act, after reciting that by an act of 54 *Geo.* 3, c. 156, it had been enacted, that the author of any book composed, and not printed and published, and his assign-

nee, should have the sole liberty of *printing and re-printing* such book for the full term of twenty-eight years, to commence from the day of first publishing the same, and also, if the author should be reservation of the right to the exclusive representation is expressly made by the author.

The assignee of the copyright of a dramatic work printed and published within ten years of the passing of 3 & 4 *Will.* 4, c. 15, and not the author who has assigned such copyright, is entitled to the sole right of representing the piece or causing it to be represented.

So, where the work is printed and published subsequently to the act, and no

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In November, 1828, the defendant, by an instrument under seal, assigned to the plaintiff, for a valuable consideration, all and every his right, title, and interest whatsoever, in the *copyrights* of this farce and other dramatic pieces. To have and to hold the said *copyrights* to the plaintiff, his executors &c., as his and their absolute property.

Previously to the assignment of the *copyright* of the farce in question to the plaintiff, the defendant duly granted to the proprietors of the Haymarket theatre, for a valuable consideration, the right of *representing* the said farce at that theatre, and the same had been frequently represented and performed there, a manuscript copy having been delivered by the defendant to the said proprietors for that purpose. These circumstances were known to the plaintiff before he contracted for the purchase of the copyright. The defendant, after granting the right of representation at the

living at the end of that period, for the residue of his life; and further reciting, that it was expedient to extend the provisions of that act; it was enacted, that thenceforth the *author* of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, *composed, and not printed and published by the author* thereof, or *his assignee*, or which should thereafter be composed, and not printed and published by the author thereof, or his assignee, or *the assignee of such author*, should have, as his own property, the sole liberty of *representing or causing to be represented* at any place of dramatic entertainment whatsoever, any such production as aforesaid not printed and published by the author or his assignee, and should be deemed and taken to be the proprietor thereof. And that the author of any such production, *printed and published* within ten years before the passing

of the act, *by the author or his assignee*, or which should thereafter be so printed and published, or *the assignee of such author*, should from the time of passing that act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication respectively, and also, if the author or authors, or the survivor of them, should be living at the end of that period, during the residue of his life, have as his own property the sole liberty of *representing or causing to be represented* the same at any such place of dramatic entertainment as aforesaid, and should be deemed and taken to be the proprietor thereof. Proviso, saving the right or authority of any person to represent or cause to be represented, who should, previously to the passing of the act, have obtained consent or authority from the author or his assignee.

Haymarket theatre, still possessed the right of representing or authorizing the representation of the farce at any other theatre at his pleasure. After the passing of 3 & 4 Will. 4, c. 15, and within twelve months before the commencement of this suit, the defendant, without the consent of the plaintiff, caused the said farce to be represented for profit at a place of dramatic entertainment in England, other than the Haymarket theatre.

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Previously to the passing of the said act, *printed* dramatic copyright pieces were constantly represented at different theatres, without the consent of any person; and the consent of the assignee of the copyright of such dramatic pieces to the representation was not necessary, and was not given or required: and pieces *performed*, and *not printed*, were sometimes surreptitiously obtained for the purpose of representation at theatres, and were represented without consent in the country, but not in London or within ten miles thereof.

The question for the opinion of the Court is,—whether the plaintiff, by virtue of the assignment, is “assignee of the author,” within the meaning of the said act, and entitled to the liberty of representing the said farce at places of dramatic entertainment, subject to the right or authority of the proprietors of the Haymarket theatre to represent the farce there? If the Court shall be of opinion that the plaintiff is such assignee, judgment is to be entered for the plaintiff for 1s. damages; otherwise a *nolle prosequi* is to be entered.


F. Pollock, for the plaintiff. The plaintiff, as assignee of the *copyright*, is put by the act in the same situation as the author himself where he has not assigned; and the author, if he had not assigned, would have had the right of restraining any other person than the proprietors of the Haymarket theatre from representing the piece. The *assignee*, therefore, may restrain the *author* from

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causing the piece, the copyright of which he has assigned, from being represented at any other theatre than the Haymarket. The 3 & 4 *Will.* 4, c. 15, recites the provision in 54 *Geo.* 3, c. 156, that the author of any book composed, and not printed and published, and his *assignee* should have the sole liberty of printing and re-printing such book for twenty-eight years from the day of publication, or for the author's life in case he should survive; and, after stating that it was expedient to extend the provisions of that act, enacts, that thenceforth the author of any tragedy, &c. (composed, and not *printed and published by* the author thereof, or *his assignee*,) or *the assignee of such author*, should have as his own property the sole liberty of representing or causing to be represented any such production as aforesaid, not *printed and published by* the author or *his assignee*. It is quite clear that in many parts of this enactment, by *assignee of the author*, the assignee of the *copyright* alone can be contemplated, and there is no reason for supposing that the expression was not used in a uniform sense throughout the act. When the act speaks of the author of any work not *printed and published by* the author or his *assignee*, it clearly cannot have been intended to use the word "assignee" as designating the assignee of the right of *representation*, but the assignee of the right of *printing, i.e.* of the *copyright*. There is no ground for the supposition which will be made on the other side, that when the word "assignee" is used immediately after that part of the section in which "assignee" so clearly means "*assignee of the copyright*," the legislature intended to designate the *assignee of the right of representation*? Here it is stated, that the defendant had assigned to the plaintiff "all his right, title, and interest whatsoever in the copyright;" therefore it is submitted that the plaintiff is now possessed of the sole liberty of representing or causing to be represented, subject, of course, to the right of the proprietors of the Haymarket theatre. The object of the legislature was to connect the right of representation with the copyright,

it having been decided by *Coleman v. Wathen* (a), and *Murray v. Elliston* (b), that the right to the copy did not give to the owner a right to prevent the representation of the work upon the stage of a public theatre. 'This act contemplates an assignee already existing, and it is clear that before the passing of that act the author had *nothing* to assign *but* the copyright.

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Sir J. Scarlett, *contra*. The question is, whether it was meant by the act to give a new privilege to the author, or to the assignee of the copyright who has given no consideration to the author for such new privilege. The assignment in this case was before the act, and therefore clearly did not *then* give this right, and the consideration, therefore, could only have been for the *copyright*. The object of the act was to give an advantage to the *author*, as a reward for his labour and an encouragement of his genius,—not to enhance the value of the property of a bookseller. Before this act the *public* had the right of representation in common with the owner of the copyright, (as is shewn by the two cases cited,) and it was very proper to take this right from the public for the benefit of the *author*, but not to transfer it from the public to the *assignee* of the copyright. It may be well to see what is the meaning of the word “assignee,” as used in 54 *Geo.* 3, c. 156. Suppose that an author, twelve years previously to that act, when he had only the copyright for fourteen years, had assigned his copyright,—would the operation of that act have been to lengthen the two remaining years of the assignee’s right into sixteen? or would it not rather have been to give the *author* a new term for fourteen years? The act of 3 & 4 *Will.* 4, c. 15, is most obscure and confused; so that it is difficult to see what was the intention of its framer; but the better construction seems to be, that the assignee who was to have the sole right of representation, should be the assignee of the *right*

(a) 5 T. R. 245.

(b) 5 Barnw. & Alders. 657.

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given by that act. The whole object of the act was, to encourage and reward the genius of the authors, by adding to the value of their interest in their own productions; and the Court will, therefore, lean to that construction which will best effectuate this object. A very wide construction in favour of an author was put upon 54 Geo. 3, c. 156, in *White v. Geroch* (a). It must be admitted that, in contending for the construction, that by "the assignee of such author" is meant the assignee of the new right, difficulties arise upon the words of the second part of the first clause, and that there is considerable force in the argument, that an assignee before the act could only be an assignee of the copyright; but though in one place the assignee must mean an assignee previously existing, it does not follow that it does not mean in another place, the future assignee of the new right. The act says, in the second part of the clause, that the author of any dramatic production printed and published, within ten years before the passing of the act, *by* the author or his assignee, or the assignee of such author, shall have the right. When the word "assignee" is used in the ablative case, it certainly means the assignee of the copyright; where it is used as the nominative case to the verb, it means the assignee of the right which the author acquires by this act. The author may now assign the right of printing to one person, and of representing to another. This act was intended, to protect only the privileges given by it; the privileges which existed before were already protected. The whole question in this case turns upon the meaning of the word "assignee," and it is contended, that notwithstanding the laborious, prolix, and obscure phraseology of this act, the meaning may be collected to be, that the assignee contemplated was the assignee of the *new privilege*, and that an author, who had previously assigned the *copyright*, might afterwards assign the right of *representation*.

(a) 2 Barnw. & Alders. 298; 1 Chitty Rep. 24.

F. Pollock, in reply. The 4th section of 54 *Geo.* 3, c. 156, would have given to the assignees of books already published the advantage of the additional fourteen years, but for the 8th section, which saves the right to the author and his representatives. [Lord *Denman*, C. J. Those precautionary clauses do not prove much.] The object of this act was not to encourage *genius*, but to protect *property*. [Lord *Denman*, C. J. Do you say that the assignee mentioned in the act of last year can *never* mean the assignee of the right of representation?] Undoubtedly the author may now assign separately. But an assignment in the terms used in this case would pass *all* the interest of the author. If the copyright only were intended to pass, there should be an exception of the right of representation. The object of the act was more effectually to protect the *copyright*. The representation is an injury to the copyright, notwithstanding that it was decided in *Coleman v. Wathen* and *Murray v. Elliston*, that the owner of the copyright could not recover under the statute of 8 *Anne*, c. 19, against another party for representing for profit without his permission. The act was intended to protect the copyright by connecting the right of representation with it.

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LORD DENMAN, C. J.—Upon the whole I am of opinion that the plaintiff is the assignee of the author, within the meaning of the late act. In one part of the clause, which gives the new privilege, the term “assignee” is clearly used as applying to a person to whom the right of printing and publishing had been assigned. It is very possible that, if this case had been contemplated by the legislature, the act would have been so framed as to provide that the *author* of a work, the mere copyright of which had been previously assigned, should have the benefit of the provisions of the act. Authors will not hereafter be much injured by this omission, because in all *future* cases they will reserve the right of representation, or obtain a double remuneration for their double right. The act was, I take it, meant

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generally to benefit the author; but it is impossible to say, that the word "assignee" has two different meanings in this same sentence.

LITLEDALE, J.—I am of the same opinion. It appears to me that the meaning of the word "assignee" is "assignee of the copyright." That is the meaning recognized by law, and the sense in which it would ordinarily be used. The legislature gives to the assignee of the copyright as to a person of a known character recognized by the former statute. With regard to the ten years' clause, upon which the question arises; in some parts of it there can be no doubt but that the "assignee of the copyright" is meant by "assignee," and I think we cannot infer that in the latter part of the clause the term "assignee" means the "assignee of the privileges created by that act." I think the object of the act was to increase the property of any person entitled to the copyright.

TAUNTON, J.—I think that the assignee of the copyright is entitled.

WILLIAMS, J.—I am of the same opinion. I am influenced much by the consideration of the meaning which the term assignee must have at the commencement of the clause, where it *can* only mean assignee of the copyright.

Judgment for plaintiff.



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THOMAS v. WILLIAMS.

DEBT by the plaintiff for salary for his services as clerk to the defendant, from January 5 to July 21, 1828. Pleas: the general issue, and the bankruptcy and certificate of the defendant. At the trial before Lord *Denman*, C. J., at the Westminster sittings after last term, the following facts appeared:—

The defendant, an auctioneer in London, had, in October, 1826, engaged the plaintiff as his clerk, at a salary of 60*l*. The plaintiff continued in the defendant's service until the 21st July, 1828. About the middle of the preceding May the defendant had fallen into difficulties, owing to which he left his business under the management of his brother, who continued to conduct it until the 21st July, when it was finally closed, and the plaintiff, and the other clerks in the defendant's service, on that account quitted. A commission of bankruptcy had been on the preceding *tenth* of July issued against the defendant, under which he was duly declared a bankrupt, and obtained his certificate. The whole of the plaintiff's salary, for the year ending in October, 1827, had been paid to him, and he had also received money from time to time on account of his services in the second year. The balance due to him, *pro ratâ*, up to the time of his quitting the defendant's employ, was 10*l*. It was contended, on the part of the plaintiff, that the certificate was no bar, for that at the time of the issuing of the commission there was no debt provable, the hiring being *for a year*, and no dissolution having then taken place; *Parslow v. Dearlove* (a). For the defendant it was contended, that the bankruptcy operated as a dissolution of the contract, and that the clerk might have proved in respect of his salary up to the time of the issuing of the commission; and that,

(a) 4 East, 438.


A clerk hired generally by the year at a certain salary, may, upon a dissolution of the contract by mutual consent within the year, recover salary *pro ratâ*, without any express agreement to that effect.

The contracts of a trader with his clerks and servants are not dissolved by the issuing a commission of bankruptcy against him; therefore the clerk of a trader against whom a commission of bankruptcy issues during a current year of the hiring of such clerk, may, after the bankrupt has obtained his certificate, recover his salary for the whole year.

So also he may recover *pro ratâ* where the contract has been dissolved by mutual consent within the year, but after

the issuing of the commission.

The departure of the clerks upon the ceasing of the trade, is evidence of a dissolution of such contract.

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supposing him to be entitled to recover, his remedy was not by an action for wages, but for breach of the special contract. Lord *Denman*, C. J., was of opinion that the salary was *not* due at the time of issuing the commission, and that therefore the certificate was no bar; and he put it to the jury, whether the parties had not separated and dissolved the contract by mutual consent, at the time when the business was closed and the plaintiff quitted the defendant's employ; and directed them, if they were of that opinion, to find for the plaintiff for 10*l.* The jury returned a verdict for the plaintiff for that sum, and the learned Chief Justice gave the defendant's counsel leave to move for a nonsuit.


W. H. Watson, in this term, moved accordingly.

Assuming that there was a contract for a year, not dissolved by force of the bankruptcy, and that it was dissolved by mutual consent subsequently to the bankruptcy, the plaintiff was not entitled to recover *pro ratâ* unless an express contract to that effect were shewn. The Court will not presume such a contract, in the absence of any evidence; *Hulle v. Heightman*(*a*). [*Taunton*, J. There was in that case an *express stipulation* that the plaintiff should *not* be entitled to his wages as a seaman, until *the end of his voyage*; and having been wrongfully discharged before the end of the voyage, it was held that he could not recover *pro ratâ*, but that his remedy was for a breach of the special contract.] In *Grimmann v. Legge*(*b*), there was a letting for a year at a certain rent, payable quarterly, and the contract being rescinded by consent, during one of the quarters, it was held that the lessor could not recover rent for the whole of the current quarter, nor, in the absence of a special contract, rent *pro ratâ*. Here, there is a contract for a year, at a salary for the whole year. [*Taunton*, J. It is not reserved, *payable quarterly*, as in *Grimmann v. Legge*. There is no stipulation whatever here as to the times

(*a*) 2 East, 145.

(*b*) 2 Mann. & Ryl. 438; 8 Barn. & Cresw. 324.

of payment.] In *Turner v. Robinson* (a), it was held that a servant, discharged for misconduct during the year for which he was hired, could not recover wages for any portion of that year. In *Cutler v. Powell* (b), *Lawrence, J.*, cited a case from 1 Salk. 65.—[*Taunton, J.* There the promise was to pay so much *for the year* (c) for the plaintiff's services. That makes all the difference.]

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There is another very important question to be decided; namely, whether the issuing of a commission against a merchant or trader, does not, ipso facto, dissolve his contracts with his servants. The contract between a master and servant has always been considered *sui juris*, and not to be tried by any analogy to other contracts. *Lawrence, J.*, in the case already cited (d), rejects a comparison which had been made between the case of a sailor who had been hired for a particular voyage, and the common case of a hired servant, who, as he states, is considered to be hired with reference to the general understanding upon the subject. The policy of the bankrupt law is to discharge the trader from all the liabilities which he was under at the time of his bankruptcy. Therefore the Court will favour a construction which will effectuate this object. As this is a case of the first impression, the great hardship which will be imposed upon traders by a decision that their contracts with their servants are not dissolved by their bankruptcy, may be offered as an argument against it. Suppose a case of a banker becoming bankrupt, and having in his employ at the time clerks whose salaries amount to 1000*l.* a year, it would be a great hardship upon him to continue, notwithstanding his certificate, liable to the claims of those clerks in respect of a portion of time during which he had no occasion for their services; and it would be a hardship also upon the clerks not to be able to prove *pro ratâ* under the bankruptcy, and to be liable, moreover, to be compelled to

(a) 6 Car. & Payne, 15; *ante*,
 vol. ii. p. 829.

(b) 6 T. R. 326.

(c) The expression used in Salk.
 is "*per annum*."

(d) *Cutler v. Powell*.

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continue in the service of the bankrupt until the expiration of the year, although the bankrupt has no means of paying them. By the 48th section of the late Bankrupt Act (a), where any bankrupt is indebted, at the time of issuing the commission against him, to any servant or clerk, in respect of wages or salary, the commissioners may order so much as is due, not exceeding six months' wages or salary, to be paid out of the estate; and such servant and clerk is at liberty to prove under the commission for any sum exceeding that amount. If the construction put upon this section be, that the commissioners may pay the servant or clerk his wages due in respect of six months' service antecedent to the then current term of his contract, the section will hardly have any application at all; for there are rarely any arrears in the payment of salaries to clerks and servants. It seems to be contemplated that, upon the issuing of the commission, the contract is dissolved, so as to make the salary, *pro ratâ*, due at the time of the commission.

Lord DENMAN, C. J.—This is a question of such very great importance, that we had better take a little time, in order that it may be thoroughly considered.

Cur. adv. vult.

On a subsequent day in the term, Lord DENMAN, C. J., delivered the judgment of the Court. After shortly stating the facts of the case, his lordship proceeded:

It appeared to me that the salary was *not* due at the time of issuing the commission; that the certificate was, therefore, no bar; and that the plaintiff was entitled to recover on the quantum meruit for that part of the second year during which he acted as clerk, the jury agreeing with me in opinion, that his ceasing so to act because his master

(a) 6 *Geo.* 4, c. 16.

ceased to carry on the business, proved a dissolution of the contract by mutual consent.

A new trial was moved for on the ground that the act of bankruptcy, or at least the commission, operated *ipso facto* as a dissolution of all contracts,—a proposition for which no authority was cited. But the learned counsel referred to the 48th section of the Bankrupt Act, (which enables the commissioners to pay all servants of the bankrupt such wages as may be due at the time of the commission,) as proving that contracts of hiring and service were considered to be thereby terminated; and he urged the great inconvenience and hardship on merchants who become bankrupts, if they should continue all their lives liable to the numerous persons whom they may have been compelled by misfortune to discharge from their employ.

But we are of opinion that this section only operated to legalise the humane practice which prevailed before the passing of the act, of paying clerks and servants full six months' wages out of the estate, and that it has made no alteration in the legal effect of the *contract* of hiring; and consequently, that as the wages had not become due at the time of the commission, either by efflux of time, or by a dissolution of the contract, the bankrupt's certificate forms no defence to this action. It may be added, that the inconvenience apprehended is not likely to occur often, as persons in the plaintiff's situation must be expected to avail themselves of the section above referred to.

Rule refused (a).

(a) The *words* of the 48th section of the Bankrupt Act seem to be scarcely capable of bearing such a construction as would "operate to legalize the humane practice which prevailed before the act," for the *words* seem to extend only

to the case of wages *due* in point of law, whereas the *practice*, it is conceived, was to pay to servants and clerks their wages in full, (to the extent of six months' wages,) without regard to their *strict legal* position.

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THE KING v. The Company of Proprietors of the LIVERPOOL EXCHANGE.

By an act incorporating certain persons for the purpose of erecting an exchange in L., it is enacted that the Company shall provide two rooms to be used as public rooms for the purpose of transacting such commercial business as the Company shall think proper; such rooms to be provided, out of the yearly profits of the undertaking, with such articles as the Company shall direct; to be open to the proprietors, and not to be alienable. The Company make and furnish a

news-room, which they provide with newspapers, &c.; in which public notice is given of commercial and nautical information, by a servant of the Company employed to collect it, and to which non-proprietors are admitted upon payment of a certain sum annually. Stock in trade, profits, and other personal property are not ratable in L., but property is there rated according to its *fair annual value to let*.

Held, that the Company are ratable for the room at its annual value to let, with reference not only to its situation, size, and accommodations, as a news-room, but also to its attendant revenue from the annual subscriptions.

But they are not ratable in respect of the value of the privilege of the proprietors attending *free* of charge, although by a regulation of the Company, proprietors *not* attending are entitled to receive the same sum in respect of their share that is *paid* by ordinary subscribers.

Any advantages attendant upon a building, which would enable the owner to let it at a higher rent, may be taken into the account in estimating its ratable value.

THE proprietors of the Liverpool Exchange were rated to the relief of the poor of the parish of Liverpool, as owners and occupiers, at 2s. 4d. in the pound, upon an annual sum of 1200*l.*, for their public news-room in the Exchange Buildings, and the conveniences and improvements thereof, and the privileges thereto annexed or appertaining; and upon appeal against this rate, the Liverpool Borough Sessions confirmed it, subject to the opinion of this Court upon the following case :

The appellants were incorporated for the purpose of erecting an Exchange at Liverpool, by 42 Geo. 3, c. lxxi.

By the 6th section it was enacted, inter alia, that two or more rooms should be provided in the intended buildings, which should be used as public rooms for the purpose of transacting such business respecting trade and commerce, as the company of proprietors should think proper; and that such rooms should, out of the yearly or other income to arise from the profits of the undertaking, be furnished and provided with such necessary and other articles as the Company should from time to time direct; and that the Company, their successors or assigns, should have admission to such rooms free from any further individual expense, but subject to such regulations, at such times, and in such manner, as the Company should from time to time order and direct.

By section 7, the Company are authorized to sell, let, or dispose of any of the lands and premises purchased by them under the powers of the act, and which should not be deemed necessary for the purposes aforesaid, or of any part or parts of the buildings to be erected under the powers of the act, except such as were intended to be appropriated for public rooms and accommodations in the manner specified.

By section 8 it was enacted, that the property in the concern, and in the lands purchased, and the buildings and the profits arising therefrom, should be vested in the company of proprietors, and that they should respectively be entitled thereto, in shares and proportions, according to the amount of their subscriptions, subject to the conditions in that act contained, or thereafter to be agreed upon by the Company.

The undertaking was divided into 800 shares, and the buildings were finished in 1808. There are two large public rooms for commercial purposes, as directed by the act, one of which is let by the Company to the underwriters of Liverpool, and rated in their hands. The other room, which is called "The Exchange News-room," is held by the Company, by whom it has been fitted up and furnished, and is supplied with newspapers and periodical literary and commercial publications. There are a master and several assistants, paid by the Company. It is the duty of the master to obtain the earliest account of the arrival of vessels, and other nautical information, and to communicate it by public notice to the persons frequenting the room.

The following bye-laws or regulations have been duly made under the authority of the act of parliament :

That non-proprietors be permitted to subscribe, upon payment of 3*l.* 3*s.* per annum.

The each proprietor not attending the room, receive the annual sum of 3*l.* 3*s.* in respect of each share.

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Those proprietors who have held more shares than one, and have frequented the news-room, have received three guineas in respect of each share above one, and the proprietors not using the news-room have been paid three guineas on each share. Annual subscribers, not being proprietors, have paid three guineas a year, and proprietors have been admitted to use the room free of charge, but they have not received the three guineas in respect of the shares, as proprietors of which, they were admitted.

Stock in trade, profits, and other personal property, are not rated in the parish of Liverpool. The rate in that parish is laid upon the principle of taking the fair annual value of the property to let.

The Exchange news-room, if let simply with reference to its situation, size, and accommodations, as a news-room, and without reference to its attendant revenue, as above stated, is of the annual value of 600*l.* only.

The appellants contend, that the assessment upon the Company should be reduced to that sum ; and if the Court be of that opinion, the same is to be reduced accordingly.

If the Company are ratable in respect of profits; but the value of the privilege of those proprietors who attend the room is not to be included therein, the room is of the value of 1000*l.*, and the assessment should be reduced to that sum.

If the Company are ratable in respect of their annually divisible profits derived from the room, according to the sum for which the room would let, with its whole attendant revenue, (including in the calculation of the amount of such revenue, the sum of three guineas in respect of each proprietor, who *uses* the room, and therefore does *not* receive the three guineas to which he would otherwise be entitled ;) the news-room in question is worth the annual sum of 1200*l.* ; and in such case the rate is to be confirmed.

The case was argued in last Easter term.

Alexander in support of the order of sessions. The rate ought to stand at the full amount. The room is ratable at its clear annual value, taking into consideration its situation and other advantages. The argument that the rate ought to be reduced to 600*l.*, the amount at which it would let with reference simply to its situation, size, and accommodations as a news-room, proceeds upon the supposition that the revenue beyond that amount arises in respect of *personal* property. But upon reference to the act, it will be found that the newspapers and other property in the room, are inseparable from the realty, for the Company are required to furnish the room with them. It is not in the same situation as an ordinary news-room, for under the act it *could* only be used as a public news-room. Therefore in estimating its value for the purpose, the profits of the room as a public news-room supplied with newspapers, &c. may be taken. In *Rex v. St. Nicholas, Gloucester* (a), the mayor and burgesses of Gloucester having been rated for a machine-house, to which a machine for weighing waggons in the street was appurtenant, at an amount in which the profits of the machine were included, the Court held the rate good; and *Willes, J.*, in giving his judgment, put this case: "If a billiard-table stand in a house, and a house should in respect of such table let at a higher sum, it would be ratable, while the table continued there, and was so let at the advanced rent." Both the case decided and that put by Mr. Justice *Willes* seem to apply strongly to this case. So long as the annexed things remain and increase the value, the property must be rated at the increased value. *Rex v. Hogg* (b), *Rex v. The New River Company* (c), *Observations of Lord Ellenborough* (d), *Rex v. Bradford*, (e). In estimating the amount of the profits, the value of the privilege of the proprietors who use the rooms ought to be estimated; for in effect they pay for liberty to attend three

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(a) Cald. 262; Bott's P. L. 163.

(c) 1 Maule & Selw. 503.

(b) 1 T. R. 721; 1 Bott's P. L.

(d) Ibid. 508.

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(e) 4 Maule & Selw. 317.

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guineas, in the same manner as the ordinary subscribers, inasmuch as they would otherwise be entitled to *receive* that sum.

G. Henderson, contra. The correct amount at which to rate the building is the sum for which it would let, taking into consideration its situation and advantages, without the personal property,—which sum is stated to be 600*l.* It is the room, not the revenue, which is ratable. The Company are certainly precluded by the act from letting the room, and are bound to fit it up and furnish it as a news-room; but still the principle of the rating, (to which there is no reference in the act,) must be the same. The principle is correctly laid down by Mr. Justice *Bayley* in *Rex v. Birmingham Gas Light Company (a)*, where he says, “I am of opinion that the Company ought to be assessed, not at a sum equal to the annual profits of their trade, but at that sum which the buildings, trunks, and pipes would produce to them if let at an annual rent to persons willing to carry on the trade, or that rent which the Company would be forced to pay if the premises were not their own property.” According to the argument in support of this rate, the revenue derived by this Company beyond the value of the room to let to another person willing to carry them on, may be rated. The revenue must depend on the success of the undertaking, which will depend upon the good management of the institution, and upon a variety of other causes independent of the room itself. The subscriptions which form the revenue are not given simply for the advantage of using the room, but for the information to be gained there, and the reading of newspapers, &c. The owner of an ordinary news-room is not ratable in respect of the revenue which he derives from subscriptions; and there is nothing in the act to put the subscriptions to this news-room upon a different footing, as regards ratability, from subscriptions to an ordinary news-room. All the cases

(a) 2 Dowl. & Ryl. 734; 1 Barn. & Cressw. 511.

which have been cited are distinguishable from that now before the Court. *Rex v. St. Nicholas, Gloucester*, was decided upon the ground that the machine was a part of the freehold; and the freehold, including the machine, was not rated beyond the sum at which it might have been let. Here, the freehold, of which the newspapers, &c. cannot form a part, is of the value of only 600*l.* a year. In *Rex v. Hogg*, the carding machine was a part of the house, and part of the subject-matter of the demise. *Rex v. Bradford* is clearly distinguishable. There, the decision turned in effect upon the amount of the *rent reserved* for the canteen. It is perfectly clear that a room of dimensions similar to those of this news-room, and possessed of similar advantages, might be had for 600*l.* a year. This room, therefore, ought not to be rated at a greater amount.

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Cur. adv. vult.

LITTLEDALE, J. (*a*) in this term delivered the judgment of the Court as follows:—

The question in this case is, whether the news-room of the Liverpool Exchange is to be rated at such a sum as it would let for considering its situation, size, and accommodation, without reference to the revenue derived from it in consequence of the 42 *Geo. 3*, c. 71, or whether that revenue is to be included. In the course of the argument the cases of *Rex v. Hogg* (*b*), *Rex v. St. Nicholas, Gloucester* (*c*), *Rex v. New River Company* (*d*), *Rex v. Bradford* (*e*), *Rex v. Birmingham Gas Light and Coke Company* (*f*), amongst others, were cited. These cases establish the principle that the advantages attendant upon a building, in respect either of its situation or of the mode of its occu-

(*a*) Lord *Denman*, C. J., was at the Privy Council during the argument.

(*b*) 1 T. R. 721; 1 Bott's P. L. 177.

(*c*) Cald. 262.

(*d*) 1 Maule & Selw. 508.

(*e*) 4 Maule & Selw. 317.

(*f*) 2 Dowl. & Ryl. 735; 1 Barn. & Cressw. 511.

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pation, are to be taken into the account in estimating its ratable annual value, wherever those advantages would enable the owner of the building to let it at a higher *rent* than it would otherwise fetch; but not the profits of a trade carried on in the building, and not enhancing its *rent*. The news-room in question has certain advantages and an attendant revenue in consequence of the act of parliament referred to, under which act it *must* always have those advantages and an attendant revenue, though the amount of it may be more or less, from various circumstances; but it must be a public room at all times, by the express provisions of the act. The circumstance of its being a public room permanently under the act gives it the advantages which it has, and as it cannot be let as a private news-room, or as a room for any purpose which excludes the public, it seems absurd to consider it in that light for the sole purpose of rating it. As long as it continues one of the rooms mentioned in the sixth section of the act, so long the advantages alluded to must be attached to it, and must be taken into the amount in estimating its annual value. The next question is, whether the value of the proprietors' privilege is to be taken into consideration? Now the act by the same sixth section expressly provides that the proprietors shall have admission free from any further or individual expense. If, therefore, any one were to hire the room, he would not charge any thing to a proprietor for his individual use of it; and this being so, we think that the value of the proprietors' privilege cannot be taken as part of the annual value. Upon the whole we are of opinion that the assessment must be reduced to the sum of 1000*l.*, which is found by the case to be the value, according to the principle of taking the fair annual value of the property to be let, estimated as we have already stated.

Rule absolute, to alter rate accordingly.



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The KING v. SEWARD and others.

INDICTMENT for a conspiracy. The first count alleged, that on 13th November, 3 *Will.* 4, at the parish of Chatteris, in the Isle of Ely, one *R. B. Spriggs* was a poor unmarried man, and unable to maintain himself and any poor woman whom he should marry, and that his place of settlement then was and is in St. Ives, Huntingdonshire; and that one *Sarah Brittin*, at the parish of Chatteris aforesaid, then and until her marriage was a poor unmarried woman, legally settled in and actually chargeable to the parish of Chatteris; that *Seward, Hemmington and Skeels*, of the parish of Chatteris, well knowing the premises, and unlawfully &c. conspiring to exonerate the parishioners and inhabitants of Chatteris from the charge and expense which might ensue to them from the said *Sarah* as a poor person, and then having a legal settlement in Chatteris, and unjustly to aggrieve the parishioners and inhabitants of St. Ives, and to burthen them with the maintenance of the said *Sarah*, unlawfully &c. did conspire (for the wicked intent and purposes aforesaid) to cause and procure a marriage to be had and solemnized between the said *R. B. Spriggs* and *Sarah*, (they the said *R. B. Spriggs* and *Sarah* then being respectively such poor persons of the several parishes aforesaid); and that *Seward, Hemmington and Skeels*, in pursuance of such conspiracy &c. between them had, the better and more effectually to complete and perfect such wicked and unlawful combination &c., did promise the said *R. B. Spriggs* and *Sarah*, that they would pay for a marriage licence, and all other expenses in and about the marriage between *R. B. Spriggs* and *Sarah*, and also that they would give him 3*l.* if he would marry the said *Sarah*. By reason whereof the said *R. B. Spriggs* was prevailed upon by the defendants to consent and agree, and did consent and agree to marry her the said *Sarah*, and did afterwards marry her, he the said *R. B. Spriggs*, before and at the time of the conspiracy

A conspiracy to procure a marriage between poor persons of different parishes, for the purpose of exonerating the parish of the woman and charging the other parish, is not an indictable offence, unless the parties were unwilling to marry, or some forcible or fraudulent means of bringing about the marriage were resorted to. A conspiracy to exonerate from the prospective burthen of maintaining a pauper, not at the time actually chargeable, and to throw the burthen upon another parish, by means not in themselves unlawful, is not indictable. In such an indictment, a statement that the woman was a poor unmarried woman with child, is not equivalent to a statement of actual chargeability.

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&c., and until and at and after the time of the marriage, being a poor person, and not having a legal settlement in Chatteris, but having a legal settlement in St. Ives; and the said *Sarah*, before and at the time of the combination &c., and until the marriage, being a poor person, having a legal settlement at and being actually chargeable to the parish of Chatteris. By means whereof the parishioners and inhabitants of St. Ives have, from the time of the marriage, been put to great charges and expenses, and are likely to be put to further charges in and about the maintenance of the said *Sarah*, to the great damage &c.

The second count was similar to the first, except that the overt act alleged, was a promise to give *R. B. Spriggs* 3*l.* if he would marry the said *Sarah*, omitting the promise to pay for the marriage licence and other expenses.

The third count charged a conspiracy as before, and alleged, that in pursuance of that conspiracy, *R. B. Spriggs* and *Sarah* were married together, according to the rites and ceremonies of the Church of England; and that *Seward*, *Hemmington* and *Skeels*, after such marriage as last aforesaid, on 12th December, 1832, by colour and pretence of that marriage, caused the said *Sarah* to be removed, as the wife of *Spriggs*, to the parish of St. Ives, as being the place of the last legal settlement of *Spriggs*, by virtue of a certain order of removal. By means whereof &c.

The fourth count stated that *Spriggs* was a poor unmarried man, and unable to maintain himself and any woman whom he might marry, and that his settlement was in St. Ives; and that *Sarah* was a poor unmarried woman with child, and until her marriage was settled in Chatteris; and charged that the defendants, conspiring to exonerate the parishioners of Chatteris from the charge and expense that might enure to them, in consequence of the said *Sarah*, as a poor person, being an unmarried woman with child, and then having a legal settlement in the parish of Chatteris, and unjustly to charge and burthen the parishioners of St.

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Ives with the maintenance of the said *Sarah*, she being such poor unmarried woman with child, and with the charges and expenses of the confinement and lying-in and delivery of the said *Sarah*, unlawfully and wickedly combined, conspired, confederated, agreed and met together, for the purpose last aforesaid; and being so met, did wrongfully and unlawfully, and for the purpose last aforesaid, cause and procure *Spriggs* (he being then and there such poor unmarried man, and having his last legal settlement in the parish of St. Ives) to intermarry with the said *Sarah*, (she being then such poor unmarried woman with child, and before and until her marriage such inhabitant of the parish of Chatteris as last aforesaid); that in pursuance of such combination and conspiracy of the said defendants, *Spriggs* and *Sarah* afterwards intermarried, and *Spriggs* took *Sarah* to wife. By means whereof &c.

The fifth and last count was similar to the first, adding, that the defendants did pay for a marriage licence and other expenses of the marriage, and did give *Spriggs* the said sum of 3*l.* to induce and prevail on him to marry.

The defendants having been convicted upon the trial of this indictment, Sir *J. Scarlett*, in the course of the last term, moved in arrest of judgment, on the ground that it did not appear upon the face of the indictment that the parties were unwilling to marry, or that any fraud or force was employed to bring about a marriage which the parties would not otherwise have entered into; and he cited 1 *East's Pleas of the Crown*, 461. The Court, after taking time to consider, granted a rule nisi; against which,

Biggs Andrews and *F. Kelly*, now shewed cause. The first and second counts of the indictment state that the overseers promised to give *Spriggs* a sum of money if he would marry, *by reason whereof Spriggs was prevailed upon to consent to marry*. It is not necessary to say in direct terms, that the parties were actually unwilling. [Lord *Denman*, C. J. In

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the case cited in 1 *East's Pleas of the Crown* (a), it was held, that though a marriage was brought about by overseers, in order to throw the burthen of maintaining a pauper upon another parish, and though money was given by them to the man to induce him to marry, yet if the parties were themselves willing to marry, the overseers were not indictable; for he held it necessary to support an indictment for a conspiracy to bring about a marriage,—an act in itself lawful,—to shew that the defendants had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves.] The conspiring to do an act lawful in itself for the purpose of injuring another, is an indictable offence. [*Littledale, J.* If parties conspire to do an *unlawful act*, or a lawful act *by unlawful means*, this is a conspiracy, for which they may be indicted; but that is not so where the parties conspire to do a lawful act, for the purpose of injuring another.] The indictment, properly considered, is not for a conspiracy to procure a marriage between the paupers, but for conspiring unlawfully to remove a burthen from their own parish, and unlawfully to charge the other parish. This is of itself an indictable offence, and it would be sufficient in an indictment for such a conspiracy, to charge the illegal conspiracy, without stating the means by which the object was intended to be brought about; *Rex v. Gill* (b). [*Taunton, J.* If the count charges a conspiracy generally, and then sets forth means which are innocent, it will not be intended that there are other acts, capable of being proved in evidence, which will support the general charge. That would be a trap to bring a defendant into Court without being prepared to defend himself.] It is not usual, nor is it necessary, to state all the overt acts. [Lord *Denman, C. J.* But when overt acts *are* stated, some of them must be unlawful.] The act of in-

(a) *Rex v. Fowler and others*, Taunton spring assizes, 1788, cor. *Buller, J.*
 (b) 2 Barn. & Alders. 204.

ducing a pauper of another parish to marry a woman settled in the defendant's parish, who, as the fourth count alleges, was "a poor unmarried woman with child," and therefore under 35 Geo. 3, *actually chargable* to the defendant's parish, for the purpose of charging the other parish, is an unlawful act. [*Taunton, J.* You are mistaken in your law upon the 35 Geo. 3. In *Rex v. Holm (a)*, it was expressly decided, that an order of removal was bad, which stated only that the party removed was a poor unmarried woman with child, without stating also that she was chargable.] It is *primâ facie* evidence of chargability, and that would be insufficient in an order of removal, in which the justices are bound to find that the pauper is actually chargable, but it is sufficient for the purposes of this indictment. [*Lord Denman, C. J.* *Primâ facie* chargability may perhaps be sufficient to supply an illegal motive.] It is not necessary that any unlawful overt act should be set out. A complete offence is charged, and that charge cannot be vitiated by the want of setting out the unlawful means of carrying the conspiracy into effect. It need not be averred that that which the parties conspired to do, has been done at all; *Regina v. Best (b)*, and *Russell on Crimes*, 561.

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Sir *J. Scarlett* was not called upon to support his rule.

LORD DENMAN, C. J.—No indictment for a conspiracy can be maintained unless it charge that the defendants conspired to do an unlawful act, or to do a lawful act by unlawful means; and I see neither of these requisites here. The charge here is, that the defendants conspired to exonerate the parishioners of Chatteris, and to charge and burthen the parish of St. Ives with the maintenance of a person then settled in the parish of Chatteris. It is not unlike a charge of conspiring to hire out a boy into another parish for the purpose of exonerating their own parish—an act which it cannot be contended would be unlawful. When the charge

(a) 11 East, 381.

(b) 1 Salk. 174.

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is that it was intended to do the act *by unlawful means*, it must appear *how* those means are unlawful. In *Regina v. Best and another* (a), the charge was, that the defendants conspired *falsely* to charge one *H.* with being the father of a bastard child, of which such a woman was pregnant; and it was held that the conspiracy, being *falsely* to charge a person with an ecclesiastical offence, was the gist of the indictment, and that though nothing were done in prosecution of it, it was a complete and consummate offence in itself. In *Rex v. Spragg and another* (b), the indictment charged that the defendants wickedly and maliciously conspired to indict or cause to be indicted one *Gilmore* with a capital crime, and that the defendants, according to such conspiracy aforesaid, between them as aforesaid, before and afterwards, at a session of oyer and terminer, *falsely*, wickedly and maliciously, and without any reasonable or probable cause, indicted and caused to be indicted the aforesaid *Gilmore*, with having feloniously counterfeited and forged a stamp. It was moved in arrest of judgment, on the ground that it was not alleged *in the charge itself*, that the defendants conspired *falsely* to indict *Gilmore*. Lord *Mansfield*, who delivered the judgment of the Court, said that there was no colour for the objection; that if that had been a bare, *unexecuted* conspiracy which *had never taken effect*, the objection might have had *more* weight, (though he gave no opinion as to the *degree* of weight;) but that in that case there was more than a bare conspiracy without effect, there being an overt act laid, that the defendants according to the conspiracy actually did *falsely* &c. indict the man. The *unlawful execution* was made to reflect back upon the conspiracy. The present case does not resemble either *Regina v. Best* or *Rex v. Spragg*.

LITLEDALE, J.—I think that there is no sufficient offence charged. The fourth count (to which only I now refer) states that *Spriggs* was a poor unmarried man, unable

(a) *Supra*.

(b) 2 Barr. 993.

to support himself and any woman he might marry, and settled in St. Ives, and that *Sarah Brittin* was a poor unmarried woman with child, and settled in Chatteris,—without saying that she was a poor woman *chargable to the parish*,—and then alleges that the defendants, conspiring to exonerate their parish from the charge that *might ensue* in consequence of such facts, and to burthen the parish of St. Ives, did combine for the purpose aforesaid, and being so met, did unlawfully, for the purpose aforesaid, procure the marriage. Now, as to the conspiracy to procure a marriage, that is no offence at all, and the indictment does not state that it was procured by any means that were unlawful. If it had been alleged that it was done for sinister purposes or by unlawful means, the case would have been different; but there is nothing of the kind: and as to the conspiracy to discharge the parish of Chatteris, and to throw the burthen upon the parish of St. Ives, that is no crime at all. They might well do that, unless they brought it about by unlawful means.

TAUNTON, J.—I am of opinion that no sufficient crime is charged. The mere persuading a man to marry is not in itself unlawful. It may be so, if it be done by unfair means. It is not stated that the parties were unwilling; nor that the marriage was brought about by any fraud, stratagem or concealment, or by dint of duress, imprisonment, or threat. No unlawful means are stated, and the object itself is not now forbidden by law. Inhabitants may well meet together to exonerate their own parish, as, for instance, by hiring out a poor boy into another parish, provided they do not resort to unlawful means.

WILLIAMS, J.—Upon that part of the indictment which charges a conspiracy to marry, I am very clear. Upon the fourth count, I have had, in the course of the discussion, some doubt, because I have always understood that a conspiracy might be a complete offence without reference to

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the illegality of the overt acts. But upon consideration, I doubt whether, without an overt act, the conspiracy itself amounts to any crime. I do not think it is altogether clear that it is sufficiently averred that the woman was actually chargable. This, I think, should distinctly and without doubt appear.

It may admit of a doubt whether the count charges a conspiracy to exonerate the defendants' parish and to throw a burthen on St. Ives. The first part of the count states that the defendants, conspiring to exonerate, &c. unlawfully combined and conspired, *for the purpose last aforesaid*. It may be a question whether this is equivalent to alleging that the parties conspired *to do the act*; *Rex v. Nield and others (a)*.

Rule discharged.

(a) 6 East, 417.

#### HODGKINSON v. HODGKINSON.

A defendant, taken upon a *capias ad respondendum*, is entitled to be discharged if between the writ and the copy served upon him there is a variance either in the *sound* or in the *sense* of any of the words.

As where, in a *capias*, the address was to the sheriff of *Middlesex*, and in

the copy to the sheriff of *Middesex*.

The Court will not amend a defective writ of *capias*.

**KNOWLES**, in the early part of the term, obtained a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex, on the ground of an irregularity in the copy of the writ of *capias* served on the defendant; the irregularity consisting in a variance between the *writ* which was directed to the sheriff of Middlesex and the *copy*, in which the letter *l* in Middlesex was omitted. The Court granted the rule, upon the authority of *Nicol v. Boyn (b)*, and *Smith v. Crump (c)*.

*Stephen*, Serjt., shewed cause. This is sufficiently a

(b) 10 Bing. 339; 1 Moore & Scott, 812. (c) 1 Dowl. Prac. Ca. 519.

*copy* to satisfy the Uniformity of Process Act(a). It was not intended that the copy should be a fac simile, but that it should be substantially a copy. In *Nicol v. Boyn*, though the omission was of a single letter only, the *sense* of the words in the writ and copy was different. Here, there is no difference but in sound. No mistake could possibly have been occasioned by abbreviating *Middlesex* into *Mid-deser*. If by *Middlesex* any thing could by any possibility be understood but the county of Middlesex, the discrepancy might be material. This is an abbreviation well understood, and therefore as good as if the word were written at length.

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*Knowles* contra. If abbreviations are introduced, they must be abbreviations commonly known and used, and which the party to whom it is to be delivered is likely to understand. This was evidently not *intended* to be an abbreviation. If there be a difference either in the *sound* or in the *sense*, the discrepancy is fatal; *Nicol v. Boyn*, *Byfield v. Street* (b), *Smith v. Crump*. In *Smith v. Crump*, *Parke, J.*, said, "If we were to enter into the question as to what is *material* and what is *immaterial* in the process, we shall have innumerable questions of that sort coming before the Court." [Lord *Denman, C. J.* Suppose that the *capias* had been defective in omitting the *l*, and it had been inserted in the copy, what then?] The *capias* might be amended by the Court, *Byfield v. Street*, but not the copy. [Taunton, J. I rather think the converse is more true; that the copy may be amended from the writ, but that the *capias* may not be amended. The judges have determined not to amend the *capias*. *Littledale, J.* The Courts have refused over and over again to amend the *capias*.]

LORD DENMAN, C. J.—I rather think Mr. *Knowles's* rule, that if either the sound or the sense be varied, the copy is

(a) 2 Will. 4, c. 39.

(b) 10 Bingh. 27; 2 Moore & Scott, 812.

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not to be considered a true copy, is as good as any. This is not a *copy* either in sound or in sense. This kind of objection is not one which it is well to make, and I am very sorry to be obliged to give it effect.

LITLEDALE, J.—The omission of the *l* makes a difference in the sound; therefore, I am sorry to be obliged to say, this cannot be deemed a *copy*.

TAUNTON, J.—I do not like these minute objections, but still if we were to say that the taking away *one* letter was immaterial, then two would be omitted, and then three, and then four; so that at last, the rule would be entirely lost sight of.

Rule absolute.



In re ———, Gent. one, &c.

The Court will not receive an application to strike an attorney off the rolls, except at the hands of a barrister.

MR. *PITT*, the plaintiff in the cause of *Pitt v. Coombs*, in person applied to the Court for a rule calling upon an attorney of this Court to shew cause why his name should not be struck off the roll of attorneys; which application he was about to found upon affidavits which he held in his hand, imputing misconduct to the attorney in conducting the defence in *Pitt v. Coombs*.

LORD DENMAN, C. J., (after consulting with Mr. *Le Blanc*, the master.)—The Court has said that they will not receive an application of this sort except at the hands of a barrister. There are obvious reasons for such a rule.

Rule refused.



DOE *d.* BIASS *v.* HORSLEY.

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**EJECTMENT** for lands in the county of York. At the trial before *Alderson, J.*, at the York spring assizes, 1832, the plaintiff was nonsuited, subject to the opinion of this Court upon the following case :—

21st August, 1800. *Thomas Biass*, the elder, devised the premises to his son *Thomas*, in fee, subject to an annuity of 30*l.* to his daughter *Hannah*, (the lessor of the plaintiff,) payable quarterly, which he thereby charged upon the said lands. And the testator declared his will to be, that if the annuity should be unpaid for 20 days after the day of payment, being lawfully demanded, it should be lawful for *Hannah* to enter and distrein; and in case the annuity should be behind and unpaid for 40 days next after any of the days of payment, it should be lawful for *Hannah* to enter into and enjoy the lands so charged, and receive the rents, issues, and profits thereof, for her own use and benefit, until she should be thereby paid and satisfied all the arrears of her annuity, with all costs, &c. or until the person then entitled to immediate possession of the premises should pay her all the arrears of the annuity incurred before, and that should be incurred during such times as they should respectively receive the rents, issues, and profits thereof, or be entitled to receive the same, together with all costs, &c.

Where a rent-charge is granted with power to the grantee, in case the rent should be in arrear for a certain space of time, to enter and enjoy the lands charged, and to receive and take the rents, issues, and profits, for his own use and benefit, until satisfaction of the arrears of rent, with all costs; the grantee may, upon the rent becoming in arrear, maintain ejectment against the tenant, without proof of a previous demand of the rent.

1802. Upon the death of the testator, his son *Thomas* entered, and resided on the premises till 1829, when he let them to Messrs. *W. and W.*, who continued in possession as his tenants till Lady-day 1830. Certain persons to whom the premises had been mortgaged, then took possession, and continued in possession until Lady-day 1831, when the defendant entered as their tenant. The annuity was in arrear from 1823 to 1828.

Messrs. *W. and W.*, and afterwards the mortgagees, by themselves or their tenant, have regularly paid the annuity to *Hannah* during the time they have had possession. No demand of payment of any of the quarterly payments, or



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arrears of annuity, or of possession of the lands, was proved.

The jury found that five years of the annuity, from 1823 to 1828, still remained unpaid at the time of the bringing of the ejectment.

The learned judge being of opinion that a *demand* was necessary, nonsuited the plaintiff, subject to a special case, with liberty to enter a verdict for the plaintiff, in case a demand should be thought unnecessary.

*John Henderson*, for the plaintiff. No demand was necessary either by the terms of the devise, or by reason of any general rule of law. The will gives two remedies in case of nonpayment of the annuity; the one by distress, and the other by entry. Certainly, that part which gives the *distress* professes to require that a demand shall be previously made; but even if this were a case of a distress, it would not be necessary to shew a previous demand; *Kind v. Ammery*(a), *Browne v. Dunnery*(b). That part of the will which gives the right of entry is entirely silent about the demand. There is no rule of construction, popular, legal, or grammatical, by which this restriction in the sentence giving the other remedy, can be imported into this, which is a perfectly distinct clause.

Then is it necessary under any general rule of law? Where the right of entry claimed is in destruction of, or in derogation from the estate of the *ter-tenant*, the authorities certainly shew that there must be demand before entry. But that is not the case here. The lessor of the plaintiff only seeks to enter to take the profits temporarily for the satisfaction of her annuity. The reasons upon which, according to *Co. Lit.* 201 b, and *Lord C. B. Gilbert on Rents*, 73, the necessity of a demand, in cases where it is sought to obtain possession of the land absolutely by way of forfeiture, appears to be founded, are evidently inapplicable to the present case. This is the

(a) Hatton, 23.

(b) Hobart, 208.

case, not of a forfeiture, but of a claim to have the land "in manner as for a distress (*a*), and there is no authority to support the proposition that a previous demand is in such case requisite. *Jemmott v. Cowley* (*b*) was a case of a rent-charge in fee, with power for the grantee, his heirs &c., if the rent should be in arrear, to enter into the lands, and hold them until they should be satisfied the rent. It is reported by five different reporters. From the report in 1 *Keble*, it appears that there was a question as to the sufficiency of a demand made in this form: "I come to demand," and the Court conceived it to be sufficient, the entry being but *by way of distress*, and not penalty of forfeiture. In none of the other reports is this question as to the demand at all adverted to; from which it may be judged that it was not thought material. In *Viner's Abridgement*, Demand, B. 8 (*c*), it is said to have been held by *Pemberton, J.*, "That if legacies be given by will, and that, in case of nonpayment, the legatees may enter and *enjoy the profits* of such and such land *until satisfied*, no demand is necessary, for there is no *forfeiture*." Such a clause as that contained in the will now before the Court is not to be considered as in the nature of a *condition*, which is to be construed strictly against the person seeking to take advantage of it, but it is a *limitation of the use*, which is to be construed according to the *intent* of the parties; *Havergill v. Hare* (*d*). In addition to these authorities, it need hardly be observed, that the introduction of this restriction upon the now very common mode of recovering a rent-charge on land, would be productive of the greatest inconvenience.

*Hoggins, contra.* At the trial, Mr. Justice *Alderson* said that he had consulted with Mr. Justice *Patteson*, and that they were agreed in thinking that a demand was necessary.

- I. The proviso, making requisite the demand, may be
- |                                 |                      |                                           |
|---------------------------------|----------------------|-------------------------------------------|
| (a) Littleton, sect. 327.       | <i>Keble</i> , 784.  | First point:<br>Necessity of a<br>demand. |
| (b) 1 Saunders's Rep. 112b; 1   | (c) 7 Vin. Abr. 508. |                                           |
| Lev. 170; 1 Sid. 223, 261, 344; | (d) Cro. Jac. 510.   |                                           |
| Sir T. Raymond, 135, 158; 1     |                      |                                           |
| VOL. III.                       | R R                  |                                           |

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imported from the distress clause into that giving the right of entry. But for the proviso, the *distress* might have been made *without* demand; and therefore the testator, intending that a demand should be necessary in *both* cases, introduces into the distress clause the words "being lawfully demanded," and left the other to the common law. It clearly appears that he cannot have intended that the distress should be preceded by greater formalities than the entry.

In case of an entry for a forfeiture, a demand is necessary. [*Littledale, J.* This is not a *forfeiture* of the tenant's estate, but only a *right of entry* in the grantee of the rent, enabling him to receive the profits until the rent is satisfied.] From *Co. Lit.* 201 b, "*Estates upon Condition*," it appears that in case of a rent-charge, the *land* is the debtor, and upon this account it is that a *demand* must be made. The effect of the entry here is, that the tenant *loses his land* either wholly or for a time. He is not *personally* debtor, but it is the *land* which is liable. Therefore a demand is necessary. There seems to be no ground for the distinction between the cases of estates upon conditions upon the happening of which the *whole* estate is forfeited, and those on conditions upon which the land may be taken for a *limited* period. In *Com. Dig. Rent*, (D. 3) (a), it is said, that "in all cases where an estate is upon a condition to be void for non-payment of rent, the condition will not be broken if the rent be not demanded." In *Dormer's case* (b), it was held, that, *by special* consent of the parties, a re-entry may be for default of payment of rent without demand of it, and this was acted upon in the case of *Doe v. Masters* (c). [*Littledale, J.* There is a case in *Dyer*, 348 (d), which is precisely in point against you.]

(a) Citing *Co. Litt.* 201b, and *Cro. Jac.* 145.

(b) 5 *Co. Rep.* 40 b.

(c) 2 *Barn. & Cressw.* 490.

(d) *Anon.* 18 *Eliz. Dyer*, 348 a, where it was held that no demand

by the devisee of a rent-charge was necessary to be made before the exercise of a right of entry, but that to entitle such devisee to distress, a demand must be made of the arrears.

*Henderson*, in reply. All the cases which have been quoted for the defendant, are cases of forfeiture of the estate, and therefore they do not apply to the present case.

LORD DENMAN, C. J.—Upon the authorities I own I have not much doubt, but as my brothers *Alderson* and *Patteson* seem to have taken a different view from that which we now take, we had better inquire a little further.

*Cur. adv. vult.*

On a subsequent day, the judgment of the Court was delivered by Lord *Denman*, C. J., who, after stating the terms of the devise, proceeded thus:—

The question was, whether the annuity being unpaid for six weeks, a *demand* of it was necessary before the right of entry for non-payment accrued. At the trial, my brother *Alderson* nonsuited the plaintiff for want of a demand, after consulting my brother *Patteson*. This circumstance, rather than any doubt entertained by the Court on the argument, made us pause before we came to a decision. But we have reason to believe that the learned judge who presided at the trial acted from no strong or decided opinion, and the judgment I am about to pronounce has the concurrence of Mr. Justice *Patteson*.

We think the plaintiff entitled to recover, although no demand was made, on the principle (established by many authorities cited at the bar) that the present is not a case of *forfeiture* for non-payment of the annuity, but only of a right to *enter* and receive the profits till the arrears are satisfied. In the former case, a demand is necessary; in the latter, there is no authority for saying that it is. The anonymous case quoted from *Dyer* (a) appears to go further, for it is there decided that the *heir* may enter for non-payment of an annuity to the devisee of the annuity, without any demand. But *Pierson v. Sorrel* (b) is directly in point.

(a) *Dyer*, 348.

(b) 2 Show. 185; Vin. Abr. Demand, B. 8.

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*Pemberton, C. J.*, held at nisi prius, that if legacies be given by will, with a direction that, in case of non-payment, the legatees may enter and enjoy the profits of *such and such land* till satisfied, *no demand* is necessary, *for it is no forfeiture, but an executory devise*, although there be a place and time appointed for payment. The reporter adds, "So was the case of *Tyrrel v. Gossick* here." This indeed occurred at nisi prius, but it is the ruling of a great judge at a time when the learning on subjects of this nature was in daily operation, and it is consistent with all the authorities. The nonsuit must therefore be set aside, and our judgment will be for the plaintiff.

Judgment for the plaintiff.



THOMAS, Gent., one &c. *v.* SAUNDERS and TIMMINS, Esqrs.

The *double costs* given to magistrates by 21 Jac. 1, c. 12, s. 5, are those costs only which are recoverable in the ordinary course of law, doubled.

CASE against the defendants as justices of the peace of the county of the borough of Carmarthen, for having willfully, maliciously, and without any reasonable or probable cause, issued their warrant and caused the plaintiff to be apprehended and imprisoned. The action being com-


Therefore, where the plaintiff in an action of false imprisonment against magistrates, within 21 Jac. 1, obtained an order for changing the venue for the purpose of securing an impartial trial, in which order he undertakes to pay to the defendants all the extra costs necessarily occasioned by such cause being tried in the county where the trial was ordered to be had, the defendants are not entitled to have such extra costs doubled.

Where the master has, in his discretion, allowed, upon taxation, the expenses of the witnesses of the successful party, at the assize town, for several days during which their attendance was not in fact necessary, the Court will not interfere with the master's decision, unless mala fides be shewn in such successful party—as an intention unnecessarily to increase the costs.

Previously to the assizes, the plaintiff serves on the defendant a notice, importing that the cause will not be called on until the fourth day after the commission day, and that he shall object, upon the taxation of costs, to any allowance for the time and expenses of the defendant's attorney and witnesses, beyond what would be necessary if the trial should be had before that day; and that he undertakes to withdraw the record if the cause should be called on before. The defendant is not bound to pay any regard to such notice.

*Semble*, such notice, served on the day before the commission day, after all the necessary arrangements had been made for conveying the witnesses to a distant assize town on the following day, would be too late, supposing it to be other wise good.

menced in the county of the borough of Carmarthen (a), the plaintiff applied to *Parke, J.* for leave to enter a suggestion on the roll for changing the venue from Carmarthen to Middlesex, or some other county; and after hearing the parties, an order was made that the cause should be tried in Gloucestershire, on the ground that a fair and impartial trial could not be had in Carmarthen, the plaintiff thereby undertaking to pay to the defendants all the *extra costs necessarily occasioned by such trial being had at Gloucester*. Notice of trial at the last Gloucester spring assizes was given. The commission day at Gloucester was on Saturday, March 29th. On the afternoon of the preceding day, the plaintiff caused this notice, signed by himself and addressed to the defendants, to be served on the defendants' attorney at Carmarthen:—"This cause will not be called on before Wednesday, the 2nd April next; and I shall object before the Master, on the taxation of the defendants' extra costs, necessarily occasioned by the trial being had at Gloucester, to any allowance to your attorney and witnesses for loss of time and expense beyond what shall be necessary


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(a) Pursuant to 21 Jac. 1, c. 12, s. 5, by which, if any action, bill, plaint, or suit, upon the case, trespass, battery, or false imprisonment, be brought against any justices of the peace, &c. for or concerning any matter, cause or thing by them done by virtue or by reason of their or any of their office or offices, the said action, bill, plaint, or suit, shall be laid within the county where the trespass or the fact shall be done and committed, and not elsewhere.

The section further provides, that if the verdict shall pass with the defendant in any such action &c., or the plaintiff therein become nonsuit or suffer any discontinuance thereof, in every such case

the defendant shall have *such double costs* as in and by the former act (7 Jac. 1, c. 5,) was provided.

The act of 7 Jac. 1 (enlarged and made perpetual by 21 Jac. 1) provided, that in case the verdict should pass for the defendant, the judge before whom the matter should be tried should, by force and virtue of that act, allow to the defendant his *double costs* which he should have sustained *by reason of his wrongful vexation in the defence of the said action or suit*, for which the defendant shall have *the like remedy as in other cases where costs, by the laws of this realm, are given to the defendant*.

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in case the trial be had on Wednesday next, or some subsequent day: And I hereby offer and undertake to withdraw the record if this cause shall be called on for trial before Wednesday next." The cause was a special jury cause, and it is not usual at Gloucester to take special jury causes until the Wednesday. Previously to receiving this notice, the defendants' attorney had engaged a stage-coach to take witnesses on the Saturday to Gloucester, and the mail coach on Monday to take the remaining witnesses, and the witnesses were conveyed to Gloucester by such coaches on Saturday and Monday. The cause came on for trial on the Wednesday, and was decided in favour of the defendants. The judge certified for double costs under the stat. of 21 Jac. 1, c. 12, s. 5. Upon the taxation of the defendants' costs before the master, the plaintiff objected, both upon general grounds and upon the ground of his having given the notice above mentioned, to any allowance being made to the defendants' attorney and witnesses for loss of time and expenses beyond what was necessary, supposing that the trial could not have come on before the Wednesday. The Master allowed the charges. The plaintiff also contended before the Master that "*the extra costs necessarily occasioned by the trial being had at Gloucester*" ought *not to be doubled*, under the stat. of 21 Jac. 1 (a). The Master allowed the extra costs to be doubled, but referred the plaintiff to the Court, in order that he might have their decision as to his liability to pay such costs.


Mr. Thomas, in person, obtained a rule nisi for the Master to review his taxation, against which

First point:  
 Doubling the  
 extra costs.

Chilton now shewed cause; and he contended that the extra costs which the plaintiff had, by the order, undertaken to pay, were liable to be doubled under that order; for that the object of it, namely, the indemnifying of the magistrates, would not be obtained by the plaintiff's paying them only the extra costs *taxed*; and that supposing that under the order the extra costs could not be doubled, the defendants

(a) *Vide ante, in notis.*

might treat such order as a nullity, and claim under the statute generally, for that the order was intended only to secure to the defendants the extra costs occasioned by the change of venue, *in the event of the verdict passing against them.*

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Upon the other point he contended that the notice had come too late, and that the defendants were not bound to act upon it. Second point.

Mr. *Thomas* supported his rule.

LORD DENMAN, C. J.—As to the time, the explanation is satisfactory. No mala fides is shewn: there is no reason for believing that what was done was not done in perfect good faith. With regard to the notice, it was evidently too late; and I rather think, moreover, that the defendants were not bound to pay the least regard to it. Second point.


Upon the other point, I think the rule must be made absolute for setting aside the doubling of the extra costs. First point.

LITTTLEDALE, J.—There is no ground for doubling the extra costs. If the rule had been silent as to costs, it would have been a different thing; but there being this special clause in the rule, we have only to do with that. First point.

With respect to the time that the witnesses were at the assize town, it does not appear that the witnesses were taken there earlier than was necessary with a view to increase the expenses of the cause. Upon this point the Master has fairly exercised his discretion. With regard to the notice, it was too late; besides which, it is not clear that the defendants were *bound* to take any notice of it. Second point.

TAUNTON, J.—The meaning of this act as to costs is, that those costs which the magistrates would have to recover in the ordinary course of law should be doubled. These are not costs recoverable in the ordinary course of law. These are extra costs, and not according to the ordinary First point.



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practice ; so much so, that if the plaintiff had *recovered*, he would have been bound by the rule to have paid the amount of the extra costs. Therefore I think that he is not bound to pay the double costs under the statute of *James*, as far as respects the costs contemplated by the order.

WILLIAMS, J.—I am of the same opinion. The costs arising out of the change of venue are not to be doubled.

Rule absolute for the Master to review his taxation as to the extra costs occasioned by the trial at Gloucester.

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JONES v. TYLER.

*A.* on a fair day coming to an inn kept by *B.*, with a horse and gig orders the horse to be put into the stable, but gives no special direction as to the gig. The horse is put into the stable, and the gig is placed with other carriages in the public highway, near the house, where it is the practice of *B.* to put carriages on fair days. The gig is stolen. *B.* is answerable for the loss.

When a guest arrives at an inn with a horse and gig, and gives directions to the ostler to take his horse in, but says nothing about the gig, a promise to take the gig *into the inn* may be implied.

CASE to recover the value of a gig alleged to have been brought into and put up by the plaintiff, on the 23d April, 1833, in a certain common inn, called the Black Boy, at Wribbenhall, in the parish of Kidderminster, kept by the defendant, and which gig, during the time the plaintiff was abiding in the said house, was, through the carelessness, negligence, and default of the defendant and his servants, wrongfully taken away by some person unknown. At the trial before *Gurney, B.*, at the Worcestershire summer assizes, 1833, the following facts appeared :—

The plaintiff and his son had on the 23d April, 1833, which was the day of the fair at Bewdley, come to the “Black Boy” in a gig. The plaintiff inquired of the ostler whether he had room in the stable for his horse, and the ostler after some inquiry said that there was room, and directed the horse to be taken out of the gig and put into the stable. The plaintiff and his son went into the inn to take refreshments, and whilst there the gig was placed by the ostler in a part of the highway in front of the house, upon which it was the practice of the defendant on fair

days to take the gig into the inn may be implied.

days to put the gigs, &c. of his guests, and where there were on this occasion many other gigs, &c. The plaintiff and his son, after taking refreshments, for which they paid, went into the fair to transact their business, and whilst there the gig was taken away by three persons, who claimed it as the one which they had themselves brought, and who have never returned it. This action was brought to recover the value of the gig from the defendant. *Jervis*, for the defendant, applied for a nonsuit, on the ground that the gig had not been in fact, as the declaration alleged, brought *into* and put up *in* the defendant's inn, but had been placed upon the public highway. The learned baron, however, thought that the declaration was sustained, and refused to nonsuit, but gave the defendant leave to move.

In last Michaelmas term *Jervis* obtained a rule nisi for a nonsuit, against which

*R. V. Richards* now showed cause. The ground upon which the rule nisi was obtained, was, that the place where the gig was deposited being a part of the highway, was not under the defendant's control. It is not material whether the place be or be not legally under the innkeeper's control. If the innkeeper places the property of his guest upon it, without his special direction, he is liable if the property be stolen. The authorities upon the subject are uniform. In *Calye's* case (a), it is said, that "the innholder by law shall answer for *nothing out of his inn*, but only for those things which are *infra hospitium*; and because the horse, which *at the request of the owner is put to pasture*, is *not infra hospitium*, for this reason the innholder is not bound by law to answer for him if he be stolen out of the pasture." "And with the resolution in this point, agreed the opinion of the justices of assize (viz. &c.) in &c. that if an innholder lodges a man and his horse, and the *owner requires* the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him. But it was

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(a) 8 Co. Rep. 32.

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held by them, that if the *owner* doth *not require it*, but the innholder of *his own head* puts his guest's horse to grass, he shall answer for him if he be stolen." So that if an innkeeper puts his guest's horse to grass without special direction, it continues *infra hospitium*. With this agrees 1 Rolle's Abs. p. 4. All the modern cases proceed upon this distinction, that if a party uses the inn *as an inn*, the innkeeper is liable if the guest's property be stolen, but that if he use it otherwise than as an inn,—if he do not come to it *causâ hospitandi*, then the innkeeper is *not* liable. In *Burgess v. Clements* (a), when goods were stolen out of a room in an inn, which the owner had hired as a *show-room* for the purpose of exhibiting goods for sale, and of which *he* kept the key, the innkeeper was held not liable; on the ground that the room was not entrusted to the owner of the goods merely in the ordinary character of a *guest* frequenting the inn. In *Farnworth v. Packwood* (b), a similar distinction is taken. There the goods stolen were deposited by a guest in a room which he used as a *warehouse*, and of which he had *the exclusive possession*; and the innkeeper was held not liable. In *Richmond v. Smith* (c), where a traveller went to an inn, and desired to have his luggage taken into the *commercial-room*, to which he resorted, from whence it was stolen; the innkeeper was held liable, although he proved that, according to the usual practice of his inn, the luggage would, but for the special direction, have been taken into the guest's *bed-room*. Here, the plaintiff comes to the inn, delivers his gig to the servant of the defendant *without any special direction* as to where he shall place it. It does not lie in the mouth of the defendant to say that the place in which the gig was deposited by his servant was not a *part of the inn*.

*Jervis*, *contrâ*.—The attention of the Court has not sufficiently been drawn to the declaration, which says that

(a) 4 Maule &amp; Selw. 306.

(c) 8 Barn. &amp; Cressw. 9.

(b) 1 Stark. N. P. C. 249.

the gig was brought *into* the inn and was *within* the inn. The gig was *not* brought into the inn, nor was it ever *within* the inn. The plaintiff knew that the gig was deposited in a place *not* within the inn. According to the evidence, the plaintiff did not inquire whether the *gig* would be put up in the inn, but only whether his *horse* could be so put up. The gig was put up in the open street by the *mutual consent* of the innkeeper and the owner. [Lord *Denman*, C.J. The question is, whether there has not been, for the purpose of depositing the carriages of the guests, an extension of the limits of the inn.] An innkeeper cannot extend the limits of his inn over the public highway by putting a nuisance upon it. The policy of the law respecting the liability of innkeepers to make good the losses of their guests is, to compel the innkeeper to have none but *honest servants within his inn*; a principle which is inapplicable to a case where the owner negligently allows his property to be exposed in the open street; not even the consent of the parties can constitute the highway for this purpose a part of the inn.

LORD DENMAN, C. J.—This case comes very near the line, but upon the best consideration it appears to me that the gig was stolen whilst *under the protection* of the innkeeper. The horse is put into a stable, and the gig is left under the superintendence of the ostler, who puts it in the place from which it is stolen. The innkeeper is, I think, bound to make the plaintiff's loss good.

LITLEDALE, J.—I certainly think that this case is on the extreme limits of the boundary, yet upon the whole I think that the defendant is answerable. He has the benefit of the guest's company, and of providing provender for his horse, and ought, therefore, to be liable if the guest's property be in the meantime stolen. When the hostler said that he would take the horse in, it must be implied that he promised to take the gig in also. The plaintiff did not

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mean to leave the gig entirely unprotected. The ostler put the gig where gigs are usually put upon fair days, and by doing so he makes the place a part of the inn, though it was the open street, and the defendant had no right to use it for this purpose, and although the public might have complained of the gigs as a nuisance upon the highway.

TAUNTON, J.—It does not appear that the gig was put in this place *at the instance of the plaintiff*. The locus in quo is, I think, to be considered as *part* of the inn. The *defendant* has so treated it, and he must take the consequences. If he wished to guard against the customer calling upon him to make good the loss in case the gig were stolen, he should have told him that he had no yard, or that it was full, and that, if he wished it, he would put the gig within his sight in order that he might watch it himself.

WILLIAMS, J.—I am of the same opinion. It is true that the putting of the gig upon the road might have made one or both parties liable for a nuisance, but I do not think that the defendant can set this up as a defence. If he chooses to employ a part of the road for the purpose of placing gigs on it, he should take care to guard them from being stolen. This case certainly goes very near the limits, yet upon all the facts I think that the defendant has made himself liable.

Rule discharged.

BUCK v. LEE.

Upon the  
assignment  
of a simple  
contract debt,  
the assignor

**ASSUMPSIT** for goods sold and delivered, work and labour, money lent, money had and received, and upon an account stated. Plea: that after the causes of action had

must be considered as having the order and disposition of the debt with the consent of the true owner until the debtor has notice of the assignment.

Such debt will therefore pass to the assignees under a bankruptcy by virtue of 6 Geo. 4, c. 16, s. 72, and to the assignees under the Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 31.

accrued, the plaintiff was discharged under the Insolvent Debtors' Act (7 Geo. 4, c. 57,) and had duly conveyed and assigned to the provisional assignee, amongst other things, all the right, title, interest, and trust of him, in and to all his real and personal estate and effects (except &c.), and *all debts due* or growing due to him. Which conveyance and assignment vested the causes of action mentioned in the declaration, and the sums of money therein alleged to be due from the defendant to the plaintiff, and also the right, title, interest, and trust of the plaintiff, of, in, and to, the same, in the provisional assignee.

Replication: that before the discharge, the plaintiff, by indenture (*profert in curia*,) assigned the debts specified in a schedule thereunder written, amounting to 2459*l.* 13*s.* 3*d.*, to *Gustard*, in part-payment of a large debt owing from the plaintiff to *Gustard*, with an irrevocable power of attorney to sue in the name of the plaintiff; that, in the schedule under the indenture written, was and is set forth and particularized the debt or sum of money then due from the defendant to the plaintiff, and set opposite to the plaintiff's name in the said schedule, and now sought to be recovered in this action: "*Lee, Edward Hughes, 55*l.* 5*s.**;" and that the 2459*l.* 13*s.* 3*d.* still remains due to *Gustard*. Averment: that the conveyance and assignment mentioned in the plea did not vest the said cause of action and sum of money, and the right, title, interest, and trust of the plaintiff in and to the same, in the provisional assignee. Verification and prayer of judgment in *præcludi debeat*.

General demurrer and joinder.

*Manning*, in support of the demurrer. The replication is bad in form and in substance. In form, because it has an informal conclusion, the plaintiff not having prayed judgment *and his damages*, but judgment *if he ought to be barred*. But it was not thought worth while to demur specially where the replication was substantially bad, in a point which nothing can aid. By the Insolvent Debtors'

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Act mentioned in the plea, and under which it is admitted on the record, that the defendant was discharged, and conveyed his property to the provisional assignee, it is enacted (sect. 30): "That if any person who shall petition the Court for his or her discharge under this act, shall at the time of his or her arrest, or other commencement of suit, imprisonment, or by the consent and permission of the true owner thereof, have in his or her possession, order, or disposition, any goods or chattels (a), whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration, or disposition, as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said Court, by the conveyance and assignment executed in pursuance of this act." The language of the section is copied from the corresponding provision in the Bankrupt Act which had passed in the preceding year, 6 *Geo.* 4, c. 16, s. 72, under which it has been held, that until notice to the debtor of an assignment of the debt, the assignor must be considered as having the order and disposition of the debt, and that an allegation in pleading of the assignment of a debt does not imply notice to the debtor of such an assignment having taken place; *Dean v. James* (b). There is no statement in this replication that the debtor had notice of the assignment, and therefore the replication is bad. The replication is also defective, in not stating that the action is brought with the privity of *Gustard*, and for his benefit. This statement was probably omitted, because the facts of the case would not have supported the allegation.

(a) That *debts* are within the terms "goods and chattels," *vide Bullock v. Dodds*, 2 Barn. & Alders. 258, 272; *Fulwood's case*, 4 Rep. 65; *Slade's case*, *ib.* 95; *Ford & Sheldon's case*, 12 Co. Rep. 1;

*Clayton's case*, Litt. Rep. 80; Staunf. Prac. 45, 188; *Ryall v. Rowls*, 1 Vez. sen. 367, 369.

(b) *Ante*, vol. i. 392; 4 Barn. & Adol. 546.

*Hoggins*, contra. The plaintiff's replication is framed upon the authority of *Winch v. Keeley* (a), in which case the replication is precisely similar to the present, and contains no allegation of notice to the debtor. *Winch v. Keeley* was not cited in *Deun v. James* (b), nor were other cases which are in point. The case was left merely on the argument, that until notice to the debtor, the debt remained in the order and disposition of the bankrupt. This may be admitted; but by the plaintiff's assignment the debt passes *primâ facie* to the assignee. It therefore lies upon the party relying upon the exception to *rejoin* that the debt remained in the order and disposition of the bankrupt or insolvent. In *Eckhardt v. Wilson* (c) also, no notice of the assignment is stated in the pleadings; nor is the point noticed in *Carpenter v. Marnell* (d). The consent of the true owner to the possession of the bankrupt or insolvent is a fact for the jury, and ought to have been raised for their consideration by a special rejoinder.

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*Manning*, in reply. By rejoicing in the manner suggested, the defendant, though using affirmative words, would have taken upon himself the proof of a *negative*, namely, that the debtor had *not* received notice of the assignment. In *Winch v. Keeley* the attention of the Court and counsel was addressed to another object, and the minor point as to the formalities necessarily to give effect to an assignment was not considered. If the counsel, who argued for the defendant in that case, had anticipated the decisions in *Munro, Ex parte* (e), *Burton, Ex parte* (f), *Usborne, Ex parte* (g), he would, no doubt, have urged the point; but the point, whether good or bad, was evidently overlooked. [*Littledale, J.* In *Ryall v. Rowls*, which was decided before *Winch v. Keeley*, the necessity of notice to the

(a) 1 T. R. 619.

(b) *Suprà*.

(c) 8 T. R. 140.

(d) 3 Bos. &amp; Pul. 40.

(e) 1 Buck, 300.

(f) 1 Glyn &amp; Jam. 207.

(g) *Ibid*.



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debtor was mentioned. It appears to me that *notice* is merely *evidence* of the assignment.] 'The assignment would be good *quâ* assignment, without any notice to the debtor, that is to say, it would operate to transfer the debt *as between assignor and assignee*. In the other cases which have been cited no question of the sort could arise upon the *pleadings*. In *Eckhardt v. Wilson* (a) the right of the assignee to sue was put in issue by the plea of non assumpsit. In *Carpenter v. Marnell* (b) the pleadings are not stated; besides which, the point did not there arise, the question there being as to the transfer of the bankrupt's interest in a promissory note, which would require no notice. Though the bankrupt had omitted to indorse the note, he could not be said to have in his order and disposition an instrument, with the possession of which he had actually parted for a valuable consideration. [*Littledale, J.* My present impression is, that you ought either to have traversed the assignment, or have stated specially in your rejoinder, that the debt was in the order and disposition of the insolvent. In the equity cases which have been referred to, the whole of the evidence would be before the Court.]

*Cur. adv. vult.*

LORD DENMAN, C. J., on a subsequent day in the term delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded thus:—In support of the demurrer to the replication the case of *Dean v. James* (c) was relied on. We think that that case was rightly decided, and it is a direct authority to show, that the replication is bad. It will, therefore, be unnecessary to go further into the consideration of the point which was there decided.

*Hoggins* then applied for leave to amend on payment of costs, stating that this had been allowed in *Dean v. James*;

(a) *Suprà.* (b) *Suprà.* (c) In 1 Nevile & Manning, 392.

and that the plaintiff had been misled by the pleadings in *Winch v. Keeley*.

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Lord DENMAN, C. J.—We think, upon the whole, that leave should be given to amend.


Leave to amend on payment of costs.

WYLDE and another v. PORTER.

**ASSUMPSIT** on a promissory note for 100*l.* and interest, payable on demand, made by the defendant in 1824, and delivered to the plaintiff. Plea: the general issue, and the statute of limitations. At the trial before *Littledale, J.*, at the last spring assizes for Nottinghamshire, the plaintiffs produced a joint and several note for 100*l.* and interest, payable on demand, and dated 12th July, 1824, subscribed "*John Henry Shearman, Thomas Shearman, James Wheeler, Robert Porter*. Witness to the signature of *J. H. Shearman* and *Thomas Shearman, William Wilson*." The plaintiffs proved the defendant's signature, and the payment of interest within six years by *Thomas Shearman*. It was shewn that the defendant was merely a surety, and that when he signed, the signatures of the two *Shearmans* were already upon the note. *Wilson*, the subscribing witness, not having been called, *N. R. Clarke* applied for a nonsuit on that ground. The learned judge refused to nonsuit, and left the case to the jury, giving the defendant leave to move for a nonsuit upon the question as to the necessity of calling the subscribing witness. The jury found a verdict for the plaintiff. *N. R. Clarke*, in the last term, obtained a rule nisi for a nonsuit upon the point reserved; against which

In an action against *A.* upon a promissory note more than six years old, and which purported to be the joint and several note of *A.* and *B.*, and the signature of *B.* to which purported to be attested by *C.*, evidence of payments of interest within six years by *B.* is not sufficient to take the case out of the statute of limitations, unless *C.* is called, although it appears that *A.* signed the note as surety for *B.*, whose name was already subscribed to the note.

*Whitehurst* now shewed cause. The defendant being a surety, and having signed the note at a time when the signatures of his principals were already upon the note, is

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estopped from saying now that one of them is not a party to it. The defendant must be considered as having executed an instrument, in which there is a *recital* that the two *Shearmans* were parties to it. Suppose that this had been a regular guarantee and had recited that the two *Shearmans* were indebted to the plaintiffs in the sum of 100*l.*, and the defendant had signed, he could not afterwards say that the *Shearmans* did not owe the plaintiffs any thing. It is not, however, necessary to go so far as to say that there was an *estoppel* in the case: but it is sufficient if there is *evidence* that *Thomas Shearman* was a party to the note. [Lord *Denman*, C. J. You gave *parol evidence* of that fact. The very object of having an attesting witness is to exclude *parol evidence*.] The principle upon which it was decided in *Whitcomb v. Whiting (a)*, that a payment by one of the parties to a joint and several note takes the case out of the statute, is, that the one acts as the *agent* of the other parties to the note. It is sufficiently shewn here that *Thomas Shearman*, in paying the interest upon the note, acted as the agent of the others.

The Court, without calling upon *Clarke* to support his rule, made it absolute.

Rule absolute.

(a) 2 Dougl. 652.

DOE, on the several demises of WILLIAM SWEETLAND  
 and CHARITY HILL, v. WEBBER.

In an ejectment brought by a person claiming under

a post-nuptial settlement against a subsequent purchaser from the husband, declarations and admissions by the husband that he had received valuable consideration from the purchaser are not admissible in evidence.

Whether a post-nuptial settlement made by a husband upon the wife at the instance of his wife's friends, she having, at the time of her marriage, been entitled to legacies which were then in the hands of executors, and one of which continued to be so at the time of the settlement, is or is not a fraudulent conveyance within the statute, 27 *Eliz.* c. 6, so as to be void as against creditors and subsequent purchasers for value—*quære*.

EJECTMENT for lands called "Middle Langford," in the county of Devon. The cause came on to be tried

before *Park, J.*, at the Devonshire spring assizes, 1832, when a verdict was taken for the defendant, subject to the following case.

17th October, 1786. *W. Western* died seised, having by his will, dated 9th September, 1786, devised Middle Langford to his wife for life; remainder to *John Hill* in fee.

Upon the death of *W. Western*, his widow took possession of the premises.

4th March, 1798. *John Hill* married *Charity Sweetland*, one of the lessors of the plaintiff (who was of age), without the knowledge of her friends.

*Charity Hill* was entitled to 100*l.* under the will of *John Sweetland*, and to 400*l.* under the will of *Benjamin Sweetland*. These legacies were then in the hands of the respective executors, and were payable on attaining twenty-one or marriage.

11th May and 22d May, 1798. The executors of *Benj. Sweetland* purchased in the maiden name of *Charity Hill* 600*l.* consols, in two portions, with the 400*l.* legacy.

A day or two after the marriage, a settlement was talked of by the mother and uncle of *Charity Hill*, and on the 24th March, 1798, instructions were given for it to Mr. *Wood*, an attorney and connection of the family of Mrs. *Hill*; and he prepared a deed of settlement, which was duly executed on the 26th May, 1798, and which was made between *John Hill* and *Charity* his wife, of the one part, and *W. Dingle* and *W. Sweetland*, of the other part. By this deed the 100*l.* and 600*l.* were assigned to *Dingle* and *Sweetland* in trust (inter alia) to allow *John Hill* to have the interest or produce as long as he and his wife should both live, and he should not be a bankrupt or insolvent; in which latter case the trustees were to hold in trust for the separate use of the wife during the life of *Hill*. After the death of either of them, the other was to have the whole capital. The trustees were empowered to recover from the executors of *John Sweetland* the 100*l.* which had not been paid, and were authorized to lend both sums to the husband, upon

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such security as they should in their discretion think proper to accept. In the same settlement *John Hill* demised Middle Langford (to the reversion of which he was entitled in fee) to *Dingle* and *Sweetland* for eighty years, if *Charity Hill* should so long live, to commence after the death of *Ann Western* and himself, in trust, to permit her to receive the rents for her life during the term.

18th September, 1798. The legacy of 100*l.* was paid to *John Hill*.

25th September, 1798. The 600*l.* consols were transferred into the names of the trustees of the settlement, and remained standing in their names till November, 1803, when it was sold out by them and advanced to *John Hill*.

Several other legacies were, after the marriage, bequeathed to *Charity Hill*, amounting to 150*l.*, which she received during coverture.

4th and 5th February, 1803. By lease and release between *John Hill*, of the one part, and *John Wilcocks*, of Exeter, banker, of the other part, *Hill*, in consideration of the moneys thereafter to be advanced by *Wilcocks*, conveyed the premises to *Wilcocks* and his heirs, in trust, to sell the same after six months' notice from *Wilcocks* to *Hill*, if the debt should not exceed 800*l.*, and after one month's notice if the debt should exceed that sum; the notice to be left at the dwelling-house of *Hill*. The produce, when sold, was to be applied in satisfaction of the debt, and the surplus to be paid to *Hill* and his heirs. But the estate was to be re-conveyed, in case *Hill* should pay the amount due before the expiration of the notice.

No money was advanced to *Hill* at the time of the execution of this deed. The only evidence given at the trial of any money being at any time advanced by *Wilcocks* to *Hill*, or of any debt existing from *Hill* to *Wilcocks*, was the following, which was received by the learned judge, subject to the opinion of the Court as to its admissibility:

A copy of a notice from *Wilcocks* to *Hill* was read. This notice recited the lease and release, and that 900*l.* was

then due from *Hill* to *Wilcocks*, and gave notice of an intention to sell, in pursuance of the powers given by the indentures, within one month.

This notice was stated by *Tapley* (clerk to Mr. *Pidsley*, who prepared the mortgage,) to have been served at the dwelling-house of *Hill*. *Pidsley* stated that after the notice had been so left, *Hill* and his brother came to him in consequence, and requested him to interfere with *Wilcocks* not to sell the property, the brother promising to pay off the debt. *Hill* did not say the money had not been advanced. The brother paid 100*l.* towards it. *Pidsley* also stated that when the security from *Hill* to *Wilcocks* was prepared and executed, he had no intimation of any marriage settlement.

A commission of bankrupt, dated 14th September, 1804, which had been issued against *Hill*, and the last examination of the bankrupt under this commission, were read. In his examination the bankrupt stated that he had had, in right of his wife, 100*l.* and 600*l.* consols; that he had been entitled to the reversion in fee of an estate called Little Langford, subject to the life interest of *Ann Western*; that he had conveyed this estate, by lease and release of 4th and 5th February, 1803, to *Wilcocks*, in trust, for sale, on his advancing 800*l.* thereon; that he understood some doubts had arisen as to the validity of his conveyance to *Wilcocks*, but that he could not say whether they were well or ill founded; that he had received a notice from *Wilcocks*, bearing date the 2d February, 1804, that in default of payment of the sum of 800*l.* and interest within one month, he would proceed to sale.

*E. Wilcocks*, who was in his father's bank in 1798, and knew *Hill*, stated that *Hill* banked with the firm until 1803 or 1804; that he made out an account in 1804, and inclosed it in a letter to *W. Hill*, the brother of *John Hill*. This letter was produced, and was as follows:

" Western Bank, Exeter,  
15th February, 1804.


Sir,

Mr. *Pidsley* this day informed us that you will pay us the amount of money that we have advanced your brother *John*,

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if we will omit selling Langford, but that you cannot engage to pay it in less than three months. We understand three months from the date of the notice we gave him. The present is to inform you that we are willing to oblige you, provided you pay us 100*l.* towards the said debt on or before the 24th instant. We are, &c."

"P.S. The balance due to us, with interest up to the 24th December, is 90*2l.* 8*s.* 3*d.*, as per account delivered to Mr. *Hill*."

The witness said he had no doubt that he saw his brother, but he would not state that he had communicated this letter or the state of the account to him, but he stated that he did himself (i. e. the brother) offer to the Bank to pay off the demand by instalments, and that he actually paid 100*l.* of the mortgage debt.

It was objected, on the part of the plaintiff, that the *copy* of the notice was not admissible, and that the declarations of *John Hill*, made after the execution of the settlement, and his last examination, and the letter of the bankers to *W. Hill* and his proposals to them, were not properly received against the plaintiff to prove the existence of a debt from *John Hill* to *Wilcocks*.

1817. *John Hill* died, leaving *Charity Hill*, one of the lessors of the plaintiff, him surviving.

June, 1831. *Ann Western*, the tenant for life, died.

The other lessor of the plaintiff, *William Sweetland*, is one of the trustees under the settlement.

The defendant, *Webber*, claims under the mortgage of 5th February, 1803.

The questions for the opinion of the Court are—First, Whether the plaintiff, whose lessors claim under the settlement of the 24th May, 1798, is, on the facts above stated, entitled to recover: Secondly, Whether the evidence objected to was admissible; and whether there was legal evidence of any debt being due from *John Hill* to *Wilcocks* under the mortgage of the 5th February, 1803, or of there being any valuable consideration for that deed.

*Follett* for the plaintiff. It is not intended to deny that under 27 *Eliz.* c. 6, a purchaser for valuable consideration is entitled to prevail over a voluntary settlement; but the defendant, in order to entitle himself to the benefit of that statute, must prove himself to *be* a purchaser for a *valuable consideration*, and must also shew that the post-nuptial settlement is a *voluntary* settlement, or made *without* valuable consideration.

I. Has the defendant established that the deed, under which he claims as tenant to the mortgagee, was made upon valuable consideration? Of this he is bound to give clear and positive evidence. The recital in the deed is not evidence for *the party making it*, and against parties claiming under a prior deed. Besides, the consideration stated is money *to be* advanced. It should be shewn by legal evidence that what the deed contemplated as a thing to be done in future, was in fact done. It should be shewn by legal evidence that there *was* an advance of money upon the security of that deed, and in pursuance of it. The mode by which this is attempted to be done was, by putting in *admissions* and *declarations* of *John Hill*, made by him *after he had by the deed* of settlement, *under which the lessees of the plaintiff claim, parted with his interest* in the property. Declarations and admissions of an assignor must, in order to defeat the title of the party to whom he has conveyed, have been made antecedently to that conveyance, and whilst he was the owner of the property, and not afterwards. Where a person parts with his interest in any kind of property, no admission subsequently made by him is evidence against the party to whom he has assigned his interest (a). The evidence which was re-

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First point:  
Whether sufficient evidence of consideration for mortgage.

(a) *Vide* *Clipsam v. O'Brien*, 1 Esp. N. P. C. 10; *Smith v. Simmes*, *ibid.* 330; *Walker v. Broadstock*, *ibid.* 458; *Duckham v. Wallis*, 5 Esp. N. P. C. 251; *Bacon v. Chesney*, 1 Stark. N. P. C. 192; *Collenridge v. Farquharson*, *ibid.* 259; *Robson v. Andrade*, *ibid.* 372; *Ivat v. Finch*, 1 Taunt. 141; *Peaceable v. Watson*, 4 Taunt. 16; *Doe d. Johnson v. Earl of Pembroke*, 11 East, 504.



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Second point:  
Whether settlement valid  
against subsequent purchaser for valuable consideration.

ceived in this case is only good if the *admissions* of *Hill* are good.

II. Supposing the Court to consider that there *was* evidence of consideration for the mortgage, the question arises, whether the conveyance by the husband to the trustees in 1798, was a fraudulent voluntary conveyance within the meaning of the 27 *Eliz.* c. 6. The marriage took place on 4th March, 1798, without the knowledge or consent of the wife's friends, she being then entitled to legacies of 100*l.* and 400*l.*, which were *in the hands of the executors* under two wills. Shortly after the marriage, a settlement is talked of by the friends of the wife, and instructions to prepare one are given by them. After this, but before the execution of the deed, the legacy of 400*l.* is invested in the funds in the maiden name of *Mrs. Hill*, and the legacy of 100*l.* remains in the hands of the executor. The settlement was then made, transferring to the trustees the stock and money belonging to the wife, upon trusts which were for the benefit of both husband and wife, and giving to the trustees a trust term in the property to which the husband was entitled in reversion, for the benefit of *Mrs. Hill*, in case she should survive. There being here property of the wife (whether 500*l.* or only 100*l.*) to which the husband had *no title at law*, and which he *could not recover without the intervention of a Court of Equity*, the wife was, according to the rules of equity, entitled to call upon him to make a settlement upon her, either out of that fund or out of his other property; and if so, the settlement cannot be treated as voluntary. A settlement made *bonâ fide* between the husband and the friends of the wife, under circumstances in which he *might* in a Court of Equity *be compelled* to make a settlement upon the wife, will be valid, as a settlement made for a valuable consideration, against both the creditors of the husband and subsequent purchasers from the husband, although it be made *without* the intervention of a Court of Equity. Propositions to this effect are laid

down in *Roper's Husband and Wife* (a), and the authorities to which that writer refers fully support the text. *Middlecome v. Marlow* (b), which is one of the cases cited, is precisely in point here. There the wife was entitled to a legacy which was in the hands of the executors of the will, so that the husband could not reach it without the assistance of a Court of Equity. Instead of taking the case into equity, where the husband would have been compelled to make a settlement, the executors themselves paid the legacy upon terms of settling the amount upon his wife, which was done; and the settlement was supported against subsequent creditors of the husband. *Ward v. Shallett* (c), *Lady Arundel v. Phipps* (d), *Wheeler v. Caryl* (e). These cases also shew that the question as to the *adequacy* of the consideration will not be weighed with nicety, provided the settlement be just in general, the question being whether there was *fraud* in the transaction. Where the settlement *vastly* exceeds the consideration, this will *raise a presumption of fraud*. There is no pretence here for saying, nor has it been attempted to shew that the consideration was so inadequate to the value of the settlement as to raise a presumption of a fraudulent intention, nor indeed is there any evidence whatever of inadequacy. Legacies to the wife in the hands of executors at the time of marriage, fall within the rule which obtains in Courts of Equity, that the husband shall not have the money without making a proportionate settlement upon the wife. *Brown et Ux. v. Elton* (f), *Blount v. Bestland* (g), *Mealis v. Mealis* (h). In *Deeks et Ux. v. Strutt* (i), it was attempted to maintain an action at law for a legacy; and one of the grounds upon which the judgment of the Court (who decided against the right claimed) proceeded was, that in

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(a) Vol. i. pages 257 and 321.

(b) 2 Atk. 519.

(c) 2 Vez. sen. 16.

(d) 10 Ves. 140; and upon an issue at law, in 6 East, 257.

(e) Amb. 121.

(f) 3 P. Wms. 202.

(g) 5 Ves. 515.

(h) 5 Ves. 738 (a).

(i) 5 T. R. 690.

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equity the husband was compellable to make a settlement upon the wife, when he claimed a legacy which had been bequeathed to her. The only question where a post-nuptial settlement is made upon a wife who is entitled to a legacy or other property, which, except through the intervention of a Court of Equity, her husband could not reach, is, whether the settlement is *just and equitable* as against subsequent creditors and purchasers. It is stated in this case, that at the time of the mortgage the mortgagee had no notice of the prior deed of settlement; but notice or want of notice is immaterial, the question being merely whether there has been a valuable consideration for the respective deeds.

First point.

*Crowder*, contra. I. There is evidence of a valuable consideration having been given for the conveyance in 1803. The proposition that the admissions of *John Hill* cannot be received in evidence to shew that valuable consideration passed, contains in it a petitio principii, for unless it be first established that the previous conveyance was valid, *John Hill* cannot be taken to have parted with his interest, so as to make his subsequent statements inadmissible in evidence against the party who claims under the first deed. The defendant seeks to avoid the settlement as a fraudulent conveyance within the statute of *Eliz.* If, as the defendant has to contend, the settlement is void as against a purchaser for value, it cannot be said that by reason of his *fraudulent act* (for such it is in law, though no moral fraud may have been committed,) he shall not be admitted to give evidence to support the title of a purchaser against a party who founds his title upon the previous act of fraud. Both parties claim under *John Hill*, and each contends that there was *no* consideration for the conveyance under which the other claims; why then is it to be said that admissions by him that he *received* consideration from the purchaser, so as to give such purchaser a right to question the validity of the prior deed, are inad-

missible? The consideration stated in the deed of money to be advanced, is a valuable consideration proved, if the admissions of *John Hill* are evidence. The declarations made by *John Hill*, upon his examination under his bankruptcy, are admissions of a particularly solemn nature, and therefore entitled to more than ordinary weight. Much of what has been treated as a series of admissions by *John Hill*, are more than that. They are declarations *accompanied with acts*. That which took place at the meeting between *Pidsley* and *J. and W. Hill*, cannot be considered as amounting to nothing more than mere declarations by *Hill*. The payment of 100*l.* by the brother, coupled with the other circumstances, is strong evidence to shew that money *had* been advanced by *Wilcocks* to *Hill* in the manner contemplated by the mortgage deed. [*Taunton, J.* It is hard to throw upon the Court the functions of the jury as well as their own. It should have been left to the jury to say substantively whether the consideration has been paid. I will always disclaim the *privilege* of deciding upon the effect of evidence. I do not sit here as a juryman.] It is *assumed* that if this evidence *be admissible*, the consideration was proved to be valuable. If this evidence be not admissible, the valuable consideration given by a purchaser from the husband will *in no case* be capable of proof, unless *other persons* than the parties themselves actually *saw* the consideration paid. The argument which has been urged to-day goes to this length, that not only *John Hill* cannot say, but also that he cannot do any thing in derogation of the deed of settlement. [*Taunton, J.* How easy it might be for a man to *talk away* a post-nuptial settlement, if we were to allow such evidence to be admitted.] The evidence offered is something more than bare declarations. There is evidence abundantly strong to satisfy all reasonable minds that a consideration was paid for the mortgage; and there is no authority to shew that the acts of *John Hill*, and his declarations made at the time of his acts, are inadmissible. There are many cases upon evidence;

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in which declarations have been admitted, on the ground merely that the party had no interest to misrepresent (a). [*Littledale*, J. I hope not. Lord *Denman*, C. J. That must have been connected with something beyond.] It was the interest of *John Hill* to *deny* the receipt, and this is at all events a circumstance which will weigh with the Court in considering whether they shall reject evidence which would throw much light upon the real state of the facts, and as to the admissibility of which there is no authority either way.

Second point. The Court did not hear him upon the second point.

LORD DENMAN, C.J.—It appears to me to be quite clear that there was *no* evidence which ought to have been submitted to the jury upon the question whether money had been advanced by the mortgagee. *John Hill* has made a settlement which cannot be set aside or questioned without evidence of a subsequent purchase *for valuable consideration*. Of that consideration there ought to be clear legal proof. The evidence which has been given here, consists, at the highest, of declarations by *John Hill*, and I take it to be clear upon general principle, that a person who has parted with all his interest cannot by any declaration of his, *subsequently made*, derogate from the estate which he has conveyed; and that it is only by declarations made *while the interest is in him*, that he can bind those claiming under him. The conduct of *John Hill* at the meeting between himself, his brother, and Mr. *Pidsley*, together with the evidence of the payment of 100*l.*, certainly makes the transaction look *bonâ fide*, but this is not by itself evidence of the payment by *Wilcocks* of a valuable consideration. Mr. *Crowder*, who has argued with all the knowledge which could be brought to bear upon this point, was obliged at last to resort to the argument upon the absence of interest in *John Hill* to misrepresent. The absence of interest to misrepresent must,

(a) *Vide* 3 Mann. & Ryl. in *Rowe v. Brenton*.

in order to make the declarations admissible, be combined with some other circumstance. I may observe in passing, that when we say of a man that *he had no interest* to misrepresent, we assert that which perhaps we can never know. The rules of evidence are made to protect mankind from *possible* fraud, and it would be dangerous to depart from them. I think therefore that no legal evidence of consideration for the mortgage deed has been given, and that the plaintiff is entitled to recover.

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LITLEDALE, J.—This evidence is good as *between the parties to the mortgage transaction*, but third parties,—parties claiming under the post-nuptial settlement,—are not bound by it. It is not competent to a party, after he has parted with his interest to others, to bind them by any declarations in derogation of their estate. Those who claim as purchasers under the husband should shew that the money was actually advanced. I think there is no evidence to affect the interest of third persons. The only part of the evidence about which there can be any doubt, is that which relates to what took place when *John Hill* and his brother met the mortgagee's attorney after the notice of intention to sell. Certainly all that clearly amounts to declarations by *John Hill*; and the fact of the brother's paying off 100*l.* is certainly evidence that the banker had made advances on the mortgage security to that amount, but it goes no further than that; it does not by any means follow that more than 100*l.* had ever been advanced, and that sum is paid off. Against the parties claiming under the post-nuptial settlement, the evidence which was given was not properly admissible.

TAUNTON, J.—The defendant claims under the mortgage deed; the lessors of the plaintiff under the settlement. That settlement was at the time good, though it might be defeasible in the event of there being a subsequent purchaser for a valuable consideration. The question at

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the trial was, whether the mortgagee *was* to be considered a purchaser for a valuable consideration; and the question for us is, whether the evidence given was admissible. The evidence ought to be plain straight-forward evidence of payment of the money; whereas it consists only of admissions by a party, the effect of which, if admitted, would be to cut down a settlement *previously* made by himself. *John Hill* having parted with his estate by the settlement, was not competent to cut down that settlement by declarations made afterwards. I will not say what would be the effect of the evidence, if admitted. I am not a jurymen. It is not for me to say that there was not sufficient evidence to satisfy the jury of there having been any valuable consideration for that deed. I do not see sufficient to have satisfied *me*.

WILLIAMS, J.—I am of the same opinion. There was not sufficient evidence to sustain the defendant's point that a valuable consideration was given by *Wilcocks*. The question is, whether there is any legal evidence. Supposing that we say that the evidence as to the payment of 100*l.* by the brother was evidence, but that a great portion of the evidence was inadmissible, how can we say that the remainder is sufficient to lead to the conclusion that valuable consideration passed? Mr. *Crowder* contends that *John Hill's* admissions under his bankruptcy are admissible, as being particularly solemn. They have no more weight in point of law than any other declarations. The declarations are all inadmissible, and I do not see how we can say that the simple fact of a payment of 100*l.* by the brother was sufficient.

Judgment for the plaintiff.



SADLER v. PALFREYMAN, CHAMBERS, and WARD.  
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BY a memorandum signed by the parties to the first of these actions, it was agreed that such action should be settled on the following terms; namely, that *Sadler* should accept 10*l.* in full of all damages charged in the declaration in that action, and that *Palfreyman, Chambers, and Ward* should pay the costs of the *attorneys* of *Sadler* in both actions, as between attorney and client. This agreement was entered into upon an understanding that the bills of costs of Messrs. *Rodgers* and *Siddell*, (who had been the *attorneys* of *Sadler* in both the actions,) should be taxed, and that they should be so taxed on the authority and at the instance of *Sadler*. An order for the taxation of the costs of Messrs. *Rodgers* and *Siddell*, as between attorney and client, and which rule purported to be made upon hearing the *attorneys* or agents on both sides, and by consent, was subsequently made by *Littledale, J.* Upon this rule, the bills of costs of Messrs. *Rodgers* and *Siddell* were taxed by the officer of the Court, and upon the taxation more than one-sixth of the amount of the bills respectively was struck off. The bills were taxed with the authority and consent of *Sadler*, the *client* of Messrs. *Rodgers* and *Siddell*. In last Michaelmas term the Court ordered that it should be referred to the master to tax *Palfreyman* and others, and *Chambers* and another, their costs on the taxation, which costs when taxed should be paid by the said Messrs. *Rodgers* and *Siddell* to the said *Palfreyman* and others, and *Chambers* and another. The costs of the taxation having been taxed in pursuance of this rule, *Follett*, in Hilary term, obtained a rule to shew cause why the rule for taxing the costs of taxation and all further proceedings thereon should not be set aside for irregularity.

An action between *A.* and *B.* is compromised, *B.* undertaking to pay *A.*'s costs as between attorney and client. The bill of costs of *A.*'s attorney being taxed, more than a sixth is taken off. The attorney is liable to pay the costs of the taxation to *B.*

A party agreeing to pay the costs of the attorney of another as between attorney and client, is entitled to have the attorney's bill taxed.

*Maule* and *Petersdorff* now shewed cause.—The agreement was made with an express understanding by *Sadler*,



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the party immediately entitled to have the costs taxed, that *Palfreyman* and the others should stand in his place in this respect. Upon the words of the statute(a), and upon principle, there can be no doubt but that these parties are entitled to have their costs taxed. It may be suggested that the cases of *Langford v. Nott* (b), before *Plumer*, M. R., and of *Storie v. Lord Bective*, before *Leach*, V.C.(c) are authorities to the contrary, but neither of them touch the present case. In *Langford v. Nott*, the M. R. thought that the act did not apply to the case of a party not being the client, who had *already paid* the bill; and in *Storie v. Lord Bective*, the decision proceeded on the ground that the party claiming to have the attorney's bill taxed had agreed with the client to pay a stipulated amount of costs. If Sir *T. Plumer* did, in *Langford v. Nott*, express any doubts as to whether the statute applied to any case where the party requires to have the costs taxed was not the client, such a doubt was ill founded. In *Vincent v. Venner*(d), *Leach*, M. R., decided that a third party who agrees to pay the costs of a suit, as between attorney and client, stands in the same situation with respect to the right of claiming taxation of the solicitor's bill as the client himself.

*Follett*, contra. This application was not made at the instance of the client. The Court has no power to direct Messrs. *Rodgers* and *Siddell* to pay to *Palfreyman* and the others the costs of taxation. There is no doubt but that *as between Sadler and the other parties* it has been in fact agreed that *Palfreyman* and the others shall receive the costs of taxation in case more than one-sixth of the attorney's bill should be struck off; but the Court have no power to *compel the attorney* to pay those costs to any party but his *client*. The 2nd Geo. 2, c. 22, enacts, (s. 23,) that no attorney shall commence any action for the recovery of his costs until one month after he shall have delivered his


(a) 2 Geo. 2, c. 23, s. 23.

(b) 1 Jac. & Walk. 291.

(c) 1 Jac. & Walk. 292 (a).

(d) 1 Mylne & Keen, 212.

bill of the costs to the *party or parties to be charged therewith*; and afterwards it directs, that *upon application of the party or parties chargeable by such bill*, or any other person in that behalf authorized, to the Court, or to any judge of the Court in which the majority of the business has been done, such Court or judge shall refer the said bill to be taxed by the proper officer of such Court, and the respective Courts are authorized to award the costs of taxation to be paid by the attorney, if the bill taxed be less by a sixth part than the bill delivered; and if the bill be not less by one-sixth, the Court are in their discretion to charge *the attorney or client* in regard to the reasonableness or unreasonableness of such bill. It is evident that the legislature did not contemplate that the application should be by any one but *the client*, or that the costs of taxation should in any event be paid or received by any one but the attorney or the client. As it appears that the bill has been taxed by consent it may be too late to object to the order for taxation of the bill, but the Court cannot *compel* the attorney to pay the *costs of taxation* to any one but his client. In order to be within the act at all the parties must stand in the relation of attorney and client, *Langford v. Nott* (a).

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Lord DENMAN, C. J.—I have been embarrassed in the course of the argument by the circumstance of there having been cross-actions. We had better consider it as a single action. The parties to this action, for the purpose of settling it, enter into an arrangement, by which it is agreed that the defendants shall pay the costs of the attorneys of the plaintiff, as between attorney and client. If the defendants were not entitled to have the costs taxed under this agreement, and were not entitled to receive the costs of taxation in case one-sixth should be struck off, there would be no security against their being charged with *more* than the costs as between attorney and client. The clause in the act of parliament operates to give the right to have

(a) 1 Jac. & Walk. 291.

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the costs taxed, and to receive the costs of taxation where one-sixth is struck to the party *chargeable by the bill*; and it seems to me that this case falls within the express words. I can see no reason why the attorneys should not pay them here, nor why they should not pay them to the defendants.

LITLEDALE, J.—I also think that the attorneys are liable to pay these costs. When the parties entered into an agreement to pay the costs as between attorney and client, it was evidently not intended that the defendants should pay the whole amount of the bill. They were entitled to have them *taxed*; if so, they might be reduced by more than one-sixth, and if so, the defendants were entitled to receive the costs of taxation. It is no difference to whom the attorney pays the costs. The statute is in general words, to pay the costs of the taxation if one-sixth should be struck off.

TAUNTON, J.—I am entirely of the same opinion. I cannot see why *Palfreyman* should not be considered as *the party chargeable* within the words of the act. He was not *the party to be charged* to whom the attorney is required to deliver his bill; but when he entered into the agreement to pay the costs as between attorney and client, I think he had a right to see that he was not charged too much; and that he might, without violence to the words of the act, be considered as *the party chargeable*. My judgment does not proceed upon the addition of the words “or by any person in that behalf authorized,” by which is intended the *agent of the party chargeable*.

WILLIAMS, J.—I am entirely of the same opinion. The case has been argued as if *Palfreyman* had been entirely a stranger. By *Palfreyman*'s taking upon him to pay the costs as between attorney and client, he became as much interested as any other person.

Rule discharged.

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LAINSON, Executor of GRIFFITHS, v. TREMERE.

**DEBT** on a bond, dated 25d October, 1809, from the defendant to *Griffiths*, in the penal sum of 1000*l*. The defendant cravedoyer of the bond and of the condition, which (after reciting that *Griffiths* by indenture of lease, bearing even date with the bond, demised to the defendant certain hereditaments, to hold to defendant, from the 5th January then next, for thirty-one years wanting ten days, at the yearly rent of 170*l*., payable quarterly, as therein mentioned, and under and subject to certain covenants, provisions and agreements therein contained,) was declared to be, that if the defendant and two other obligors should from time to time during the continuance of the lease pay to *Griffiths* the said yearly rent of 170*l*. on certain days, and should observe, perform, fulfil and keep all and every the covenants, clauses, provisoes, conditions and agreements, contained in the indenture of lease, then the bond to be void. The defendant then pleaded, first, non est factum; secondly, that the indenture of lease recited in the condition of the bond, was a certain indenture, bearing even date with the bond, which it then set out at full length, and from which it appeared that the rent reserved, and which the defendant covenanted to pay, was only one hundred and forty pounds a year. Averments: that there were no other covenants, clauses, provisoes, conditions or agreements in the lease, which on the part of the lessee were to be paid, observed, performed, fulfilled or kept; that the defendant entered and has hitherto paid the yearly rent or sum of one hundred and forty pounds, at the days and times and by the indenture limited and appointed for the payment thereof, according to the true intent and meaning of the indenture(a).

**Replication**, that the defendant had not, since the death

(a) There were other pleas, upon which issues were joined. One of these was a plea that the rent was stated in the condition to be 170*l*. instead of 140*l*. by mistake. *Vide post*, 606.

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of *Griffiths*, paid to the plaintiff, executor as aforesaid, the yearly rent or sum of one hundred and *seventy* pounds, in the condition mentioned, according to the terms thereof.

To this replication the defendant demurred, assigning several special causes of demurrer, treating the replication as inapplicable of the plea.

Joinder and demurrer.

*R. V. Richards*, for the defendant. The question for the Court to determine arises upon the defendant's second *plea*, and is, whether the payment of the rent reserved by the lease is not to be considered a performance of the *condition of the bond*. It is submitted that by payment of 140*l.* a year the condition is performed. The bond and the deed are to be taken and considered together as parts of one and the same security (*a*). The condition recites that *Griffiths* had, by indenture bearing even date with the bond, demised certain premises for a term, at the yearly rent of one hundred and *seventy* pounds, and the condition is to pay the *said* yearly rent of one hundred and seventy pounds during the continuance of the lease. This condition points to the indenture, and it is clear that the bond was intended to secure the rent reserved in the indenture, and not that the indenture was intended to secure the rent mentioned in the bond. When a defendant is bound upon condition to perform the covenants of an indenture, in an action upon the bond, the defendant, in order to discharge himself, must (by a recital of it in his plea) shew the deed to the Court; and the reason assigned is this, "*in order that they may see what the covenants are*, i. e. in order that the Court may see what it was *the intention of the bond to secure*; *Cook v. Remington* (*b*), *Read v. Dawson* (*c*), *Lewes v. Ball* (*d*), *Tapscott v. Woolridge* (*e*), *Stibbs v. Clough* (*f*). If the Court is at liberty to look at the bond and deed together,

(*a*) *Vide* 4 Burr. 2787.

(*b*) 6 Mod. 237.

(*c*) 1 Siderfin, 50.

(*d*) 1 Siderfin, 97.

(*e*) *Ibid.* 425.

(*f*) 1 Strange, 227.

it is apprehended that these pleadings are sufficient. The Court will look at the indenture to see whether it is correctly described in the recital in the bond, and if they find that the indenture is incorrectly recited, they will remedy the defect in the bond by construing it as if it was *consistent* with the indenture which it recites, so as to give effect to the real substantial contract between the parties. Upon a comparison of the recital in this condition with the deed itself, the Court will find that the recital of the amount of the rent is incorrect, and they will therefore treat the condition of the bond as performed, if the defendant has performed that covenant in the indenture, the performance of which the bond was intended to secure.

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*Dampier*, *contra*. The defendant having *under his seal* acknowledged that the rent reserved is 170*l.* a year, cannot be allowed in *this* Court to shew, by way of defence to an action on his bond, that the rent in fact is 140*l.*, and not 170*l.* a year. [*Taunton*, J. Ought you not to *plead* the estoppel?] Where an estoppel appears in the pleadings, the proper course is to *demur*, although the party is *at liberty* also to *plead* it. This is not the case of two instruments forming together one security, as it has been contended, but it is the case of a double security, and much resembles *Cotterel v. Hooke* (a), in which it was held that the grantee of the annuity (to secure which the *deed* and *bond* were given) might sue the grantor upon the *indenture*, although the *other security* was destroyed by a discharge under the Insolvent Act, after forfeiture. In *Rowntree v. Jacob* (b), it was held, that a party who had *by deed* acknowledged that he had been satisfied a debt, was estopped from shewing that he received nothing. There were in that case even strong suspicions of fraud in obtaining the acknowledgment, yet the Court thought they would not get over the estoppel. The Court cannot look out of the deed before them, to see whether any rental is incorrectly made,

(a) 1 Douglas, 97.

(b) 2 Taunt. 141.

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whether *by mistake* or otherwise. Issue has been joined in this case upon a plea of *mistake*(a); but if the jury should find the rent was stated in the condition to be 170*l.* instead of 140*l.* *by mistake*, and should upon such finding give their verdict in favour of the defendant, the plaintiff will be entitled to judgment non obstante veredicto, for *mistake* in a deed cannot be averred in this Court; *Goddard's case*(b), *Buckler v. Millerd*(c). The very essence of an estoppel is, that a person is prevented from pleading *the truth* in opposition to his deed; and upon a very wise principle,—that where a man has solemnly acknowledged a fact to be one way, he shall not say that the fact was otherwise, although such may in truth be the case. [Lord *Denman*, C. J. It is immaterial whether the acknowledgment be true or false, if there be an estoppel. *Taunton*, J. In the old cases, the question was rather upon the form than upon what was the real intention of the parties. In modern times, the spirit is more regarded, and strict estoppels are discountenanced.] In *Strowd v. Willis*(d) it was held, that the obligor of a bond conditioned for the payment of 37*l.*, *reserved upon a demise* of land for forty years, *according to such articles* indented, was estopped from pleading that he had nothing in the land demised. In *Jermin v. Randal*(e), the condition of the bond was to pay so much weekly, *according to an order made by justices*, and the defendant having pleaded that the justices made no such order, the plaintiff had judgment. In *Hosier v. Searle*(f), the obligor of a bond conditioned for the performance of the covenants on his part to be performed, in a certain indenture bearing even date therewith, was held to be *estopped* from pleading that the indenture referred to was never executed. This must be considered a *modern* case. The true distinction is this: where the condition is for the performance of the covenants, provisoes, &c. of an indenture generally, the obligor may

(a) *Ante*, 603, n.

(b) 2 Co. Rep. 4 b.

(c) 2 Ventr. 107.

(d) Cro. Eliz. 362.

(e) Latch, 125.

(f) 3 Bos. & Pul. 299.

plead that there are *no provisoes*; but where he recites an *indenture* or a *specific proviso*, he cannot plead that there is no such indenture or no such proviso; *Holloway's case* (a). Here, is a recital of a specific proviso for the payment of a rent of 170*l.*, and the obligor is estopped from saying that there is no proviso in the indenture for payment of rent to that amount. Any indenture in which the rent reserved is of a different amount, cannot be the indenture recited. [*Little-  
dale, J.* The cases are collected in 10 *Vin. Abr.* Estoppel, (R.) from which it appears that where in a deed there is a recital of a *particularity*, the party reciting shall not be admitted to deny it.] This is clearly a *particularity*. The cases shew beyond doubt, that where a party in his deed recites an indenture, he cannot plead that there is no such indenture, yet here the party in effect specially denies that there is *any such deed* as that recited in the condition, for the *deed recited* is a *deed reserving a rent of 170*l.**; *Trevivan v. Lawrence* (b). With respect to the common observation, that estoppels are odious in the law, this means nothing more than the Courts ought not to *imply* them, and does not make the estoppel any the less a bar, when it clearly appears upon the record; *Palmer v. Ekins* (c). [*Little-  
dale, J.* Is there not here an estoppel against an estoppel?] All the cases referred to by Lord Coke (d), are cases of *judgments*; and supposing that in this case there was an estoppel against an estoppel, that should have been specifically pleaded.

*R. V. Richards*, in reply. There is a fallacy in comparing this to the common case of an estoppel. The Court will look at this condition to see what the *meaning* of it is. The condition is, to keep the covenants of the indenture, and therefore it cannot be ascertained whether the condition is kept without looking at the indenture. [*Little-  
dale, J.* It is a positive condition for payment of a certain amount of rent, upon the very terms of it.] It recites that a lease had

(a) 1 Mod. 15.

(b) 1 Salkeld, 276.

(c) Lord Raym. 1550.

(d) *Vide* Co. Litt. 352 b.

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been granted, by which 170*l.* rent had been reserved, and then the condition is to pay *the said rent of 170*l.** This refers to the former part. It is impossible to read this condition without seeing that the bond was intended to be for the purpose of securing the payment of the rent reserved by lease, otherwise, why should the former part of the condition have *recited* the indenture? The indenture and the bond, it is submitted, form two parts of *one security*. All the cases cited are cases of separate and distinct covenants. This indenture may be said to be *incorporated* in the bond, so that the two form but one security. The condition refers to the recital, and the recital to the lease; therefore the indenture *must* be looked at in order to come at a right understanding of the condition; *Viner's Abr. Faits*, (O. a. 2.) (a).

*Cur. adv. vult.*

The judgment of the Court was delivered by

Lord DENMAN, C. J., who first stated the pleadings, and then proceeded as follows :

It appears upon these pleadings, that the condition of the bond is to pay the rent of 170*l.* at certain times mentioned in the condition, and to perform and observe the covenants, conditions and agreements in the lease; and then as the lease, when set out, shews the rent to be 140*l.*, the question is, whether the payment of 140*l.* constitutes a performance of this part of the condition of the bond, or whether the defendant is estopped from shewing that the rent is different from the 170*l.* mentioned in the condition.

First point.

The first point to be considered is, whether upon this bond the defendant would be estopped from saying there is no such lease as is mentioned in the condition. In 1 *Roll's Abridgment*, 872 (b), it is said, if the condition contains a *generality* to be done, the party shall not be estopped to say there was not any such thing. But in all cases where the condition of a bond has reference to any *particular* thing, the obligor shall be estopped to say that there is no

(a) 13 Vin. Abr. 97.

(b) 10 Vin. Abr. 464, (P.) pl. 1.

such thing. The same rule as to generalities and particularities is laid down in *Stowd v. Willis* (a), *Shelly v. Wright* (b), and urged in argument in *Hosier v. Searle* (c), and *Hill v. Proprietors of Manchester Works* (d). A great number of instances are given in *Roll's Abridgment*, and in several other books, of these generalities and particularities, and amongst them as more nearly applicable to the present case. If a condition be to perform the covenants of an indenture, the obligor is estopped to say there is no such indenture: 1 *Roll. Abr.* 872 (e). So also in *Juell's case* (f), *Holloway's case* (g), and *Hosier v. Searle* (h); and by parity of reason the defendant would here be estopped from saying that there is no such indenture.

In the present case, the condition is as to a *particular* thing, as it gives the date and all the particulars of the lease. The defendant admits that he is estopped from saying that there is no lease granted to him; but then to discharge himself from the bond, he sets out the lease. This he was bound to do according to the established rules of pleading, and as more particularly detailed in *Cook v. Remington* (i). That was debt on bond, with a condition to perform covenants in an indenture. The defendant craved oyer, and the Court held that where one is bound to perform covenants in an indenture in an action on the bond, defendant, in order to discharge himself, ought to shew the deed to the Court, that they may see what the covenants are. And the same rule is laid down in 1 *Siderfin*, 50, 57, which have been cited. And the whole lease being set out, the defendant contends that the actual lease is to be taken as a further description of the lease recited in the condition of the bond, according to what is said by *Holt, C. J.* in *Evans v. Powell* (k), and that the bond and lease are to be taken as

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(a) Cro. Eliz. 362.

(b) Willes, 9.

(c) 2 Bos. & Pul. 299.

(d) 2 Barn. & Adol. 544.

(e) 10 Vin. Abr. 466, pl. 3.

(f) 1 Roll. Rep. 408.

(g) 1 Mod. 15.

(h) 2 Bos. & Pul. 299.

(i) 6 Mod. 237; 2 Salk. 498.

(k) Comberb. 377.

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together, forming one instrument. And as it appears by the lease that the rent is 140*l.* a year, the defendant says, that as it is the lease which contains the real contract of the parties, and the rent being to be paid for the occupation of the land, if he has paid the rent stipulated, he has performed the contract specified in the lease, and that it is therefore an answer to the action that the bond does not shew the contract as to the rent, but it is merely given as a collateral security for the performance of the terms of the lease; and if he has performed the terms of the lease, the bond cannot be enforced against him.

But notwithstanding this argument, we think, as far as the *bond* goes in a court of law, the *obligor* is estopped from saying that the rent was not 170*l.* a year, because his shewing the lease at a rent of 140*l.*, is in effect the same thing as saying that there is no such lease as is stated in the bond. *Fletcher v. Farrer* is thus reported in 1 *Rolle's Abridgment*, 873 (a). "If the condition of an obligation be to do certain things, for which he is bound in a certain recognizance, (shewing the certainty of it,) then the obligor shall be estopped to plead that he was not bound in any recognizance, inasmuch as the condition has reference to a *particular*. So the obligor, in the case aforesaid, shall be estopped to plead a special plea, by which he owns that he acknowledged *a thing in the nature of a recognizance*; (but upon the special matter, it appeared to the Court it was not any recognizance in law,) for this amounts but to this, that he was not bound in any recognizance." Upon what appears on the record, there is no doubt but if an action of covenant had been brought on the lease, only 140*l.* could have been recovered; and there certainly is an apparent incongruity in saying, that different sums are to be recovered according as the proceeding is on the bond or the lease. This, however, is occasioned by the defendant's having executed two apparently inconsistent instruments.

(a) 10 Vin. Abr. 467, pl. 10 & 11.

And, we think, upon the pleadings now under consideration, that the defendant cannot get rid of the estoppel, and that therefore there must be judgment for the plaintiff.

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Judgment for the plaintiff.

BARBER v. WAITE.

**DEBT** for penalties under 55 Geo. 3, c. 137, s. 6. (a) The prohibition in 55 Geo. 3, c. 137, s. 6, of the supplying of goods, materials, or provisions, for the use of any workhouse, or otherwise for the support and maintenance of the poor by the churchwardens or overseers, does not extend to materials supplied for the repair of the workhouse.


At the trial before Park, J., at the Lincoln summer assizes, 1833, it appeared that the defendant, who was a plumber and glazier, had, when an overseer of the parish of Boston, in Lincolnshire, glazed the windows of the workhouse, and had done other plumbers' work to the building; he had also furnished the parish with glass, paint, lead, and other materials,

(a) Which enacts, "that no churchwarden or overseer of the poor, or other person in whose hands the collection of the rates for the relief of the poor, or the providing for, ordering, management, control, or direction, of the poor of any parish, township, &c., shall or may be placed, shall, either in his own name, or in the name of any other person, *provide, furnish, or supply*, for his own profit, any *goods, materials, or provisions, for the use of any workhouse, or otherwise for the support and maintenance of the poor*, in any parish, township, &c. for which he shall be appointed as such, (churchwarden, &c.) during the time which he shall retain such appointment, nor shall be concerned, directly or indirectly, in *furnishing or supplying* the same, or in any contract relating thereto, under pain of forfeiting 100*l.* to any person who shall sue for the same: Proviso, that if it shall hap-

pen in any parish &c. that a person competent and willing to undertake the supply of any of the articles or things required for such workhouse, or for the use of the poor, there cannot be found within a convenient distance, other than some or one of the churchwardens and overseers of the poor, or other person or persons having the ordering, managing, control, or direction of the poor, in such parish &c., then it shall be lawful for two neighbouring justices, by certificate under their hands and seals, to permit and suffer any one or more of such churchwardens, &c. to contract and agree for the *furnishing and supplying of any articles or things which may be required for such workhouse, or otherwise, for the use of the poor* of such parish &c., during the time which he or they may retain such appointment."

The protection applies only to cases of goods, &c. supplied to the poor people.

*Semble* also, that the section does not apply to contracts for *work and labour*, but only to cases where the action would be for *goods sold and delivered*.

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necessary for that purpose. This was done in the name of one *Nathan Bean*, the journeyman of the defendant, in whose name the bill was made out, and to whom it was paid. The jury found a verdict for the plaintiff for one penalty of 100*l.*, and the learned judge gave leave to move to enter a nonsuit, or a verdict for the defendant. In Michaelmas term last Sir *J Scarlett* obtained a rule nisi accordingly, against which

*M. D. Hill* and *Whitehurst* now shewed cause. There can be no doubt that this case is within the mischief intended to be remedied by the 55 *Geo. 3*, c. 137, s. 6. It is a rule long established in Courts of Equity, that a trustee cannot buy the trust estate. *Waite* was here in the situation of a trustee, and ought not, therefore, to be permitted to furnish goods to those under his care, without incurring the penalties of the statute. He was, in truth, both the buyer and the seller. It was his duty to see that the work was done, and the materials supplied, at the *least possible expense* to the parish, and he was not likely to do his duty in this respect, if he was *himself* the party to whom the *profit* was to come. This is more clearly within the mischief contemplated by the act, than the case of a person supplying *provisions* and *clothing*, because the market price of those articles is more easily ascertained than is the case with the articles furnished here. This is within the most literal construction of the act; for the statute enacts, that no overseer shall furnish "any goods, materials, or provisions, *for the use of any workhouse.*" The objection to be made must be, that the construction, which has been in this case put upon the act, is *too* literal, and that the words "for the use of any workhouse" mean "for the use of *the poor in any workhouse.*" [*Taunton, J.* The rule was granted on that ground.] That which is for the maintenance of the house, which the poor inhabit, and which tends to their comfort there, must be *for the use of the poor.* In *Skinner*

*v. Buckee* (a) it was held, that an overseer supplying *coals* for the use of the poor, was liable to the penalties of the statute. There can be no difference between the supply of coals which are requisite to *warm the air* within the building, and the supply of glass which is requisite for the *exclusion of the cold air* from without. The words of the act extend to all articles that are required for the support and comfort of the poor, and cannot be said to have reference only to articles of consumption. Upon a comparison of the words in the enacting part of the 6th section, with those of the proviso in that section, it will appear more strongly, that the words in the enacting part extend to the prohibition of such a contract as was entered into in this case. In *West v. Andrews* (b) it was held, that a guardian of the poor, who sold *live sheep* to the master of the workhouse for the use of the poor, incurred the penalties. That was not an *immediate* sale, and if the nicety of construction, now contended for, had been adopted, it would have been held not to be within the act. The object of the 55 Geo. 3 was to protect, not the *poor*, but the *parish*, from imposition; and it plainly appears from *West v. Andrews* (c), that the object was to prevent overseers from supplying goods either to the parish or to its poor. It was said at the trial, that it might as well be contended, that an overseer, who contracted for the *building* of the workhouse itself, was within the act. But although the person who built the workhouse might not be within the purview of the act, the person who repaired it might be so. In *Proctor v. Manwaring* (d), Bayley, J., says, "The object of the act was to prevent imposition *upon the parish* by the overseers. If, therefore, goods are required *for a parish workhouse*, or if any other *general supply* is wanted, the *overseer* is not to furnish that supply."

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Sir James Scarlett, (with whom was Balguy), contra.

(a) 4 Dowl. & Ryl. 628; S. C.  
 3 Barn. & Cressw. 6.

(b) 5 Barnw. & Alders. 328.

(c) 2 Dowl. & Ryl. 184; S. C.  
 1 Barn. & Cressw. 77.

(d) 3 Barn. & Ald. 148.

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This is a penal act, and the meaning, therefore, ought not to be extended beyond what the words strictly import. The object of the act was to prevent overseers from supplying *the poor* in the workhouse; and for this *Proctor v. Manwaring* may be quoted. The intention of the legislature was to protect from imposition, not *the parish*, but *the poor*, who, if they were supplied with inferior articles and provisions, might not be able to express a free opinion. The question is, whether the words in the act "for the use of the workhouse" do not mean "for the use of the poor in the workhouse." If an overseer contracted for the *building* of the workhouse, it is admitted he would not be liable to the penalties; yet, unless it were held that the words "for the use of the workhouse" mean "for the use of the poor in the workhouse," he *would*, in such case, be liable. [*Littledale, J.* Suppose the overseer were a tailor, and contracted to mend the paupers' clothes, would that be within the act?] Such a contract would *not* fall within the act, and it is much more probable that the legislature would have wished to prevent a contract of that sort, than such a contract as that which was entered into in this case. (Here he was stopped by the Court.)

Lord DENMAN, C. J.—The question is, whether the defendant, being an overseer, is prohibited from supplying materials for the *repair* of the *workhouse*. The words of the act are, that no overseer, &c. shall "provide, furnish, or supply, for his or their own profit, any goods, materials, or provisions, for the use of any workhouse, or otherwise for the support and maintenance of the poor." It is quite clear, that furnishing materials for the repairing of the workhouse is, *in one sense*, a supplying of materials for the maintenance of the poor: but, in my opinion, the words in the act "for the use of the workhouse," mean "for the use of *the poor* in the workhouse." If this case had been *contemplated* by the legislature, it would, I have no doubt, have been provided for;

and a variety of other cases may be supposed, which it is probable that the legislature would, if they had contemplated such cases, have provided for; but we are to look to the words of the act, and see what it is that they *have* provided against. The words used are "for the use of the workhouse," which I take to be "for the use of the establishment for the maintenance of the poor."

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LITLEDALE, J.—I am of the same opinion. The supplying of articles for the use of the workhouse, means the supplying of them to *people in it*, not for the maintenance of the *building*. Therefore this case does not come within the act. I am much inclined to think that no contract for *work and labour* is within the meaning of the act. If that which is furnished for the use of the poor in the workhouse be of such a description that an *action for goods sold and delivered* could be maintained in respect of it, the case would, I have no doubt, be within the section, but I am greatly inclined to think, that the section cannot be said to apply to cases in which the remedy upon the contract would be by an *action for work and labour*. If a tailor, being an overseer of the parish, *supplied clothes* to the poor in the workhouse, this would be within the meaning of the words of the act; but I certainly think that, if he only *mended* the clothes of the poor, he would not be liable to the penalties.

TAUNTON, J.—The object of this clause in the act was to prevent a species of jobbing by overseers, when supplying bad goods to the *poor* of the parish, and thereby making an extravagant profit. I am clearly of opinion, that this case is *not* within the sixth section. An argument has been founded upon *West v. Andrews*. That case decided, that a guardian of the poor appointed under 22 Geo. 3, c. 83, was within the purview of 55 Geo. 3, c. 137, s. 6. There was nothing like a *general* decision in that case.

WILLIAMS, J.—I am of the same opinion. We should



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be extending the meaning of a penal statute, if we were to hold that this was a supplying of goods within the meaning of the act.

Rule absolute.

DOE, on the demise of OLIVER, v. POWELL and PYNE.

In 1818, *A.* conveys Blackacre to *B.* *B.* becomes bankrupt, and his assignee conveys, in 1833, to *C.* In 1824, *A.* conveys Blackacre to *D.* It is competent to *D.*, in an ejectment brought against him by *C.*, to shew that in 1818 *A.* had no legal estate in Blackacre.

Whether a conveyance by assignees of a bankrupt, where neither bankrupt nor assignees have been in possession within a year, amounts to embracery, *quære.*

**EJECTMENT** for three dwelling-houses in Newport, in the county of Monmouth. At the trial before *Gurney, B.*, at the Monmouthshire summer assizes, 1833, the following facts appeared:

1818. The members of the Tredegar Wharf Company enfeoffed *Pope* of, inter alia, the land on which the dwelling-houses now stand.

1819. *Pope* became bankrupt.

Shortly before and after *Pope's* bankruptcy, one *Williams* occupied a portion of the land as garden ground, and paid rent for it, for two years, to *Young*, who afterwards became tenant to the assignees of all *Pope's* property.

Subsequently, one *Jones* claimed this portion of land, entered, and altered the fences, and then agreed with *Williams* that he should continue in possession of it.

Shortly afterwards, the agent of the Tredegar Wharf Company entered upon the land, claimed it on behalf of the Company, pulled down fences erected by *Jones*, and put up others.

1824. The Company granted a building lease, for seventy-eight years, of part of the premises, to the defendant *Powell*.

1825. The Company granted a building lease, for seventy-five years, of another portion of the same land, to *Williams*, who afterwards assigned to the defendant *Pyne*.

1833. The assignees of *Pope* conveyed to the lessor of the plaintiff, by lease and release, the whole of the land in dispute.

The defendant proposed to shew, by a deed of 1808,

that the legal estate was not in the Company at the time of the feoffment in 1818. This evidence the learned judge rejected, on the ground that the defendants themselves came in *under* the Company, and therefore could not say that the Company had no title to convey. It was objected, on the part of the defendants, that the conveyance from *Pope's* assignees to the lessor of the plaintiff was void under the statute of 32 *Hen.* 8, c. 9, inasmuch as the assignees, at the time of conveying, had not been in possession for a year. A verdict was found for the plaintiff, but leave was given to the defendant to move to enter a nonsuit.

In Michaelmas term last a rule nisi for a new trial was obtained by *Ludlow*, Serjt., against which

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*Maule* and *R. V. Richards* now shewed cause.

I. *Powell* and *Pyne* both held under leases from the Company. It is true that a defendant in ejectment may shew the legal estate outstanding, but he cannot set up an outstanding legal estate against his own conveyance. Therefore, if the action had been brought against the Company, *they* could not have set up this defence; and if the Company could not have done so, neither could the defendants, who claim *under* them.

First point:  
 Rejection of  
 evidence on  
 the ground of  
 estoppel.

II. This was an estate of considerable extent, and it was said that the party had been ousted of a small portion of it for more than a year, and that therefore the conveyance was *embracery*. Could it be contended that it would be *embracery* to sell a manor because there had been an encroachment made upon the waste? The statute of *embracery* (32 *Hen.* 8, c. 9,) is to be construed (as the common law is usually construed,) with some reference to the altered state of things. The object of the law was to prevent great men from buying naked titles to land, and oppressing their poorer neighbours. The mischief intended to be remedied no longer exists. Many things were formerly considered *embracery* which are not so now. *Choses in action* were formerly not assignable; but, for the convenience of mercantile affairs, this rule is con-

Second point:  
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sidered as merely technical, and now the assignee of a chose in action *may* sue in the name of the assignor. If the assignor gives a release of the action without the concurrence of the assignee, the Court will order a plea of such release to be taken off the file(*a*). The conveyance here is by the assignees of a bankrupt, and the whole policy of the bankrupt law makes an exception to the law of embracery. It enables the assignee to sue upon the contracts of the bankrupt, and passes every beneficial right with respect to property to the assignees. The assignees come in *by operation of law*; so that a covenant not to assign is not broken by reason of the interest in the lease passing to the assignees under the *bankruptcy* of the lessee; *Doe v. Beran* (*b*). The bankrupt law imposes upon the assignees the *duty* of disposing of the property. Therefore, even supposing that this would be embracery at common law, the circumstance of the sellers being *assignees of a bankrupt*, confers on them a right to sell. Where a party does not intend to sell *a suit*, it is not embracery; *Williams v. Protheroe* (*c*). The Court allows every one, having the *right of possession*, to make a demise in ejectment; yet if the act is to be construed *strictly*, this would be embracery. The statute of *Henry 8* merely says, that the party guilty of embracery shall *forfeit double value*, and therefore seems to treat the *transfer* as valid. [*Taunton, J.* I suppose it appeared at the trial that the possession of *Williams* was an adverse possession.] That did not appear clearly. [*Taunton, J.* I take it that the possession of the *trustee* would, for this purpose, be the possession of the *cestui que trust*. Mr. Chitty's observations on this statute(*d*) are just.] *Disseisin* is a fact which should be found by the jury; *William d. Hughes v. Thomas* (*e*). In *Smith v. Coffin* (*f*), *Eyre, C. J.*,

(*a*) *Vide Craib and wife v. D'Aeth*, 7 T. Rep. 670; *Payne v. Rogers*, Doug. 407; *Legh v. Legh*, 1 Bos. & Pull. 447; *Barker v. Richardson*, 1 Younge & J. 362; *Hickey v. Burt*, 7 Taunt. 48.

(*b*) 3 Maule & Selw. 353.

(*c*) 5 Bingh. 309; 2 Moore & Payne, 779.

(*d*) 1 Chitty on Stat. 130.

(*e*) 12 East, 141.

(*f*) 2 H. Bla. 461.

says, "It is true that, on general principles, rights of action are not forfeitable nor assignable except in a particular mode; but that rule is founded on the policy of the common law, which is adverse to encourage *litigation*; but in this case the policy of the *bankrupt* law requires that the right of action *should* be assignable, and transferred to the assignees, as much as any other species of property."

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*Ludlow*, Serjt., and *Justice*, in support of the rule.

I. The defendants, who claimed under a conveyance executed by the Company in 1824, were supposed to be estopped, because their grantors had previously, without title, conveyed to *Pope*. There was no privity between the defendants and *Pope*, and therefore there could be no estoppel (a). First point.

II. In 1833, when the assignees assumed to convey, they were out of possession. In *Underwood v. Courtown* (b), Lord *Redesdale* says, "A person out of possession cannot in law convey any thing to a stranger; he can give only a release to one in possession; and the law has wisely provided this in order to quiet possessions." In support of this dictum, the 347th section of *Littleton* may be cited, where it is said, "That no entry or re-entry (which is all one) may be reserved and given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs; and such re-entry cannot be given to any other person." And Lord *Coke* says in his *Commentary* (c), that this is Second point.

(a) The feoffment, if by deed indented, would create an estoppel between the Company and *Pope*, *post*, 621(a), which estoppel would afterwards pass to their respective assigns, as *privies in estate*. The Statute of Frauds requires a feoffment to be in writing; and as before the statute, a feoffment, where it was not merely verbal, was usually, if not always, by deed, feoffments made since the statute have

almost invariably been by deed. As the Court, however, cannot presume a feoffment by indenture, where a feoffment by deed-poll, or by an unsealed contract in writing signed by the feoffor, would be sufficient, the question of estoppel does not seem distinctly to arise.

(b) 2 Scho. & Lefr. 65; 1 Chit. Stat. 130. And see *Saunders v. Lord Annesley*, 2 Scho. & L. 105.

(c) Co. Litt. 214 a.

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one of the maxims of the common law for the avoiding of maintenance, suppression of right, and stirring up of suits." This is a case precisely within the mischief intended to be remedied. It was a conveyance to a rich and powerful person. *Goodright v. Forrester* (a) shews that a right of entry is not assignable. *Williams v. Protheroe* merely establishes this,—that where upon a *bonâ fide* contract of sale, it is agreed that the vendee shall have the arrears of rent, and use of the vendor's name to sue for it, such an agreement is not void. *Smith v. Caffin* shews that a right of entry passes from the bankrupt to his assignees, but there it remains. It is admitted that the *assignees* might have brought ejectment, but that is not the case here. It is true, also, that the assignment of choses in action is recognized by the Courts of Law (b); but then *the action* is always brought in the name of the assignor.

Lord DENMAN, C. J.—It does not distinctly appear what are the *particular* facts of the case. I understand that these general facts occurred. The lessor of the plaintiff claimed under the Tredegar Wharf Company. That Company had, by a feoffment made in 1818, conveyed to *Pope*, whose assignees (he having, in 1819, become bankrupt) had in 1833 conveyed to the lessor of the plaintiff. In answer to this it was proposed, on the part of the defendant, to shew that the Company had not the legal estate in 1818. This evidence the learned judge rejected, on the ground that the defendants, who also claimed as subsequent lessees under the Company, could not deny the title. If this is the general state of the facts of the case, I think the learned judge was mistaken. I cannot see why the defendants were prevented from giving this evidence, because in 1824 the Company granted a lease to one of them. On this short ground, I think the rule should be made absolute for a new trial.

(a) 8 East, 566.

be a good consideration *at law* to

(b) Such an assignment would support an express promise.

LITTLEDALE, J., TAUNTON, J., and WILLIAMS, J.,  
concurred.

Rule absolute (a).

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(a) "*A. makes a feoffment by deed indented of Blackacre, wherein he has nothing, to B. and his heirs, to the use of C. and the heirs of his body, remainder to B. and his heirs. Afterwards A. purchases Blackacre. C. cannot take advantage of the estoppel, because he came in under the Statute of Uses;*" dict. per Saunders, *Anon. Freem.* 475.

It would seem, therefore, that if no *use* had been limited, *B.* and his heirs, (and consequently his assigns, as privies in estate to the estoppel,) might have availed themselves of the estoppel against *A.*, and therefore against any one claiming through *A.* by matter subsequent to the creation of the estoppel. In the principal case, it does not appear whether the lessor of the plaintiff came in under the Statute of Uses or not. The conveyance was by lease and release. The lease, (or bargain and sale for a year,) must, it is true, operate under the Statute of Uses, but if the release was to the bargainee without declaring any use in favour of

a third person, the releesee would take by common law conveyance.

"*A. recovers land in fee simple against B. by action tried, where B. had nothing in the land. Because B. appeared and pleaded to this action, this recovery shall deliver A., and his heirs by estoppel, although B. should afterwards purchase the land;*" *Jenk.* 113, pl. 20, citing (erroneously) 33 *H. 6*, 17.

"If *A.*, having nothing in the land, make a lease by deed indented, and afterwards purchases the land, the lessor is as well concluded as the lessee to say that the lessor had nothing in the land; *Co. Litt.* 47 b."

"If one make a lease for years, having nothing in the land, and afterwards purchases the land, and then dies, if the lease be by deed indented, his heirs shall be estopped from avoiding it;" per *Dyer*, *Brown*, and *Weston*, *Hil. 2 Eliz. Anon.* Sir Fra. Moore, 20, 21.

But see *P. 33 H. 6*, fo. 18, pl. 9, and fo. 21, pl. 17; *Ischam v. Morrice*, *Cro. Car.* 110, third point.

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## The KING v. The HUNGERFORD MARKET COMPANY.

Ex parte EYRE.

A public company is by statute empowered to hold lands and to purchase certain scheduled messuages, and is required to make compensation by a particular process to persons "damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purposes or otherwise in the execution of the Act." The Company purchased a house not mentioned in the schedule, and in pulling it down injured the adjoining house. Held, that the tenant of the adjoining house was not entitled to compensation by the process provided by the Act.

IN Michaelmas term last, *A. S. Dowling* obtained a rule nisi for a mandamus, commanding the Hungerford Market Company to issue a warrant to the High Bailiff of Westminster, requiring him to impanel a jury, pursuant to the 11 *Geo. 4*, c. lxx (*a*), for the purpose of assessing compensation to be made to *Eleanor Eyre* for the damage sustained by her in respect of her premises, No. 12 Villiers Street, Strand, by reason of the taking down, or beginning to take down by the Company, for the purposes of and in execution of the act, of the house and premises numbered 11 in the same street. It appeared upon the affidavits that the Company had taken down No. 11, in Villiers Street, which they had purchased, and had rebuilt it as an office for transacting their business. In pulling down No. 11, considerable damage had been done to No. 12, which Mrs. *Eyre* occupied under a lease for years, and which had been originally part of the same house with No. 11, and was not separated by a proper party-wall.

The first section of 11 *Geo. 4*, c. lxx, incorporated the Hungerford Market Company, and gave them power to purchase and hold lands &c., for the use of the undertaking.

By sect. 2, the Company are authorized to treat for, purchase, and take the several messuages &c., specified in the first schedule to the Act, or so much thereof as the Company or their directors should think necessary and proper to be taken and used for the purposes of that Act.

Sect. 5 enacted (*inter alia*), that if any persons in anywise interested or claiming power to sell the messuages &c. described in the first schedule, or any occupiers thereof sustaining any damage, should, for twenty-one days after notice, neglect or refuse to treat or agree, or should not agree for the sale of the premises, or should be prevented from

(*a*) *Ante*, vol. i. 112, 404, 548; vol. ii. 340.

treating or agreeing, or could not be found or known, or should be unable to produce a good title, the Company might cause the value to be assessed by a jury of 12 men of Westminster; and for the summoning of such jury the Company were empowered to issue their warrant to the high bailiff of Westminster, to impanel, summon, and return a jury of 24.

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By sect. 63, the Company were authorized to pull down the messuages &c., to be purchased as aforesaid, as soon as the purchases should be completed, and to build a market.

By sect. 68, in case any messuages &c. should be damaged by or in the *taking down of any of the messuages or buildings to be taken down for the purposes of, or otherwise in the execution of, that Act*, the Company were authorized and required to make to the owners and occupiers of such messuages &c. so damaged, such compensation and satisfaction for such damage as the directors should think reasonable; and in case the owners or occupiers should think the satisfaction offered by the Company not sufficient, then the same should be ascertained and settled by a jury, as in section 5.

By a subsequent section, no action was to be brought for any thing done *in pursuance of the Act* after six calendar months next after the cause of action had arisen.

No. 10 Villiers Street was mentioned in the first schedule to the Act, but Nos. 11 and 12 were not so.

Sir *James Scarlett* and *M. D. Hill*, now shewed cause. The party is not entitled to a mandamus. Had this been one of the messuages which they are empowered to purchase by the second section, the Company would have been liable. Here, the wrong complained of was not done in execution of the Act. In *Rex v. The Hungerford Market Company* (in the matter of *Mary Yeates*,) (a), the Court decided this very question. There the Company purchased No. 23, in the Strand, that house not being in the schedule, and pulled it down. Mrs. *Yeates*, who resided at No. 22,

(a) *Ante*, vol. ii. 340.



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complained of an injury done to her in pulling down No. 23, but the Court held that she was not entitled to a mandamus to compel the summoning of a jury to assess compensation, because she was not damaged by or in the taking down of any of the messuages &c. to be taken down for the purposes of or in the execution of the Act. The injury in *this* case was not occasioned by any thing done in execution of the Act. Wherever the Company might protect themselves under the authority of the Act, and plead it to an action of trespass, there, *and there only*, is the thing done *in execution of the Act*. In one sense *every* thing done by the Company is done *by virtue of the Act*, because the Company owes its *existence* to the Act; but the legislature did not use the words “in execution of the Act” in this extended sense. If they did, it might be said that the Company were liable to be commanded to issue their warrant requiring a jury to be summoned for the purpose of assessing damages in respect of a wrongful act done by their waggoner in the course of his employment. Mrs. *Eyre* has mistaken her remedy. If she has been injured she should have brought her action.

*F. Kelly and Dowling, contra. Rex v. The Hungerford Market Company* (in the matter of *Yeates*), proceeded entirely on the ground that the act complained of, viz. the removal of a party-wall, was done *under the Building Act*. Here, the Building Act is entirely out of the question. The Company by this Act are empowered to purchase and to hold lands &c. They purchase the house adjoining the house of Mrs. *Eyre*, and in pulling down that house commit the injury complained of. This is, therefore, an act done *for the purposes of and in execution of the Act*. The 68th section gives something more in the way of compensation than is provided by the common law. At common law the party could have no remedy, except for that which was occasioned by the negligence or the wilful act of another; but this section contemplates the giving compensation for damage done where there has been no negligence or wilful misconduct. [*Littledale, J.* The Company have no

power to meddle with No. 11, *by the Act.*] They could not *hold the land* except by authority of the Act. The power to hold lands is expressly given to them by the Act. [Lord Denman, C. J. Suppose the Company had purchased a house three or four streets off, and had carelessly pulled it down, would that be a case within the Act?] It is submitted that it would be so. The section which gives the public compensation in a particular mode is a great protection *to the Company*. This protection is the consideration for which the Company are to give compensation in a more summary and efficient manner than could be obtained by the ordinary course of law, for the injuries they may occasion in the prosecution of their undertaking. By the 63d section, the Company are to build a market and pull down houses for that purpose. They may purchase and pull down houses not included in the schedule, though they may not be able to *compel* the owner of a house not named in the schedule to sell. [Littledale, J. May the Company enlarge the market?] They are not confined to the present site. [Littledale, J. If the Company have a *general power to enlarge the market*, this injury may be said to be done *in execution of the Act.*] It is presumed they are not confined to the present site. The clause in the Act limiting the time for bringing actions, will prevent the applicant from recovering in the ordinary course of law. If any difficulties arise upon the wording of the Act, the Court will construe it liberally, and in favour of the claimant.

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*Cur. adv. vult.*

In the course of the term, the judgment of the Court was delivered by

LORD DENMAN, C. J., who, after briefly stating the nature of the application, and the facts disclosed by the affidavits, proceeded as follows:—

The section relied on is the 68th, which enacts, that persons shall be entitled to compensation who are “damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purposes of, or other-

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wise in the execution of, this Act." It is not very clearly made out by these affidavits whether the damage complained of was done "by or in the taking down" of No. 11, or by taking down the party-wall between No. 11 and No. 12. If it was done by taking down the party-wall, then *Rex v. Hungerford Market Company, ex parte Yeates (a)*, is directly in point, and shews that a mandamus ought not to issue. But assuming that the damage was done "by or in the taking down" of No. 11, then the question arises, whether that taking down was "for the purposes of, or otherwise in the execution of, the Act," within the meaning of the 68th section. Now it is to be observed that the Company had no power to take No. 11 against the will of the owner and occupier. They bought the house in the same manner as any other person might have done, by agreement with the previous owner. No doubt can be entertained that if any other person had so bought No. 11, or if it had remained the property of the former owner, such purchaser, or such owner, might have pulled it down without any authority from parliament, and would not have been liable to make compensation to the occupier of No. 12 for any damage not arising from negligence, unless, indeed, *the party-wall* had been taken down; in which case the Building Act would apply. But the assumption *now* is, that the damage did *not* arise from taking down *the party-wall*. Why, then, should *the Company* be obliged to make compensation in a case in which any other purchaser, or the former owner, would not have been liable, merely because the legislature, having given the Company certain compulsory powers, has thought it right to throw a larger protection over all persons who may suffer by the exercise of those compulsory powers, than by the common law they would receive? If, therefore, the compulsory powers had extended to No. 11, those who were damaged or injured by the taking down of No. 11, would have been within the Act. But in this case, where the Company had no monopoly as to the purchase of No. 11, the owners and occu-

(a) *Ante*, vol. ii. 340.

piers of the adjoining house, No. 12, stood in no need of the protection of the Act, and cannot enforce any of its provisions. The 68th section must be construed with reference to the *compulsory* powers of the Act; and it applies to no case in which those powers are not to be exercised. In some sense, *all* the acts of the Company may be said to be done "for the purpose, and otherwise in the execution of the Act;" for if the Act had not been passed, the Company *would not have existed*; but this section relates only to the taking down of houses for the purposes of and in execution of the Act, and those houses are such alone as they have a compulsory power to take. It has been urged that the clause limiting the time of bringing an action will shut out *Mrs. Eyre* from all remedy. If that clause will apply to her case, still there *was* a time when she might have sued, and if she has suffered it to elapse, that is her own fault; and that very clause shews that the legislature contemplated that some things might be done, even under the Act, which would not be the subject of compensation under the 68th or any other section. For these reasons we are of opinion that this rule must be discharged.

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Rule discharged.

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REX v. PEDLEY.

**INDICTMENT** for a nuisance. The first count charged the defendant with having made two necessary-houses, and an open cess-pool, at a place called Diamond Alley, near divers public streets in Bedford, for the common use of persons residing in Diamond Alley, which persons rented them, and committed the nuisance, whereby &c. The second count charged the defendant with *continuing* the same nuisance.

A person who lets premises with a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance.

But a landlord is not liable in respect of a new nuisance created by his tenant during the term.

When a landlord lets premises, the natural consequence of the regular use of which is that they will become a nuisance unless properly attended to, he is liable if they afterwards become a nuisance by such regular use.

The landlord ought, in such case, either to stipulate with his tenants that they will do that which is necessary to prevent the premises from becoming a nuisance, or to reserve to himself the power of entering for the purpose.

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sances, they having been previously created by persons unknown. The third count charged the defendant with putting and placing, and leaving and permitting, causing and procuring to be put, placed, and left, large quantities of ordure, whereby &c. The fourth count charged that persons unknown had put, placed, &c. whereby &c.; and that the defendant suffered the same to remain. The indictment being removed by certiorari, was tried before Lord *Denman*, C. J., at the last Bedford assizes, when the following facts appeared :—

About 5 or 6 years ago, the houses in Diamond Alley, which is in the midst of a populous neighbourhood, were built by *Harrison*, and the two privies and a cess-pool, to which there are no drains, were erected for the use of the inhabitants of all the houses. *Harrison* let the houses, with the use of the privies to all the tenants in common, and the privies became a public nuisance.

In November, 1831, the defendant purchased the whole property of *Harrison*, and had since received the rents of the tenants, some of whom appeared to have taken their houses since the defendant had become the owner. The privies had on several occasions been emptied by the tenants at their own expense, but the places had been for some time so neglected that they had become a very offensive nuisance.

In September 1832, the defendant, upon being applied to by the surveyor to the commissioners for the improvement of Bedford to remove the nuisance, said, "Depend upon it I will attend to it immediately." A similar application was made to him again in the following November, and on that occasion he said, "I know I have not done what I promised, but I will see about it directly." The nuisance being continued, the present indictment was preferred.

*F. Kelly* objected that the defendant was not, directly or indirectly, the author of the nuisance, so as to render him properly the subject of an indictment in respect of it. The Lord Chief Justice, however, directed the jury to find a

verdict of guilty, and gave the defendant leave to move the Court upon the question, whether the defendant was liable to be indicted for this nuisance.

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*F. Kelly*, in last term, obtained a rule nisi to set aside the verdict of guilty, and to enter a verdict of acquittal.

*Storks*, Serjt., and *Austin*, now shewed cause. The tenants may be indictable as having been parties to the actual commission of the nuisance, but it is a nuisance for which the landlord is also indictable. This nuisance existed before many of the tenants came into the occupation of these houses, and for permitting the nuisance to continue the defendant is indictable. The cases upon this subject are collected in *Selwyn's Nisi Prius* (a). In *Rosewell v. Prior* (b), A., tenant for years, erected a nuisance, and after a recovery against him for the nuisance, underleased to B., and the question was whether, afterwards, an action would lie against A. for the continuance. "Et per Cur.—It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it. He hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. Vide *Wm. Jones*, 272 (c). Receipt of rent is upholding; 2 Cro. 373, 555 (d). The action lies against either, at the plaintiff's election." *Rosewell v. Prior* is much more fully reported in 12 Modern (e), and will be found quite decisive. [*Littledale*, J. Had the landlord power to enter and cleanse, or to make a drain?] The locus in quo has not been demised with the houses; nothing more than a mere easement is granted to the occupiers of the houses. But apart from that consideration, the inquiry as to whether the landlord has power to enter is not the true test; for the landlord shall not be permitted to free himself from responsibility by his own act. If a wrong-doer

(a) 7th edit. 1122.

(b) 2 Salk. 460.

(c) Christian Smith's case.

(d) *Ryppon v. Bowles*, Cro. Jac. 373; *Brent v. Haddon*, ib. 555.

(e) Page 636.

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convey that from which the mischief arises to another, whereby he puts it out of his power to obviate it, he ought to answer for it; and a man's putting it out of his power to abate a nuisance is as great a tort, as not to abate it when it is in his power so to do; Judgment in *Rosewell v. Prior*, as reported in 12 Mod., *Cheetham v. Hampson*(a), *Rex v. Moore*(b). The cases are all cases of *actions*, but there appears to be no distinction in principle between the cases of actions for private nuisances, by private individuals, and *indictments* for nuisances by the king on behalf of the public.

*F. Kelly*, *contra*. In all the cases which have been quoted, the party charged originally *created* the nuisance, and this has, in the argument, been assumed to be the case here. That, however, is not so; and moreover the landlord *could* not remedy or prevent this nuisance without subjecting himself to an action. From *Rex v. Moore* it appears that the utmost extent to which the doctrine can be carried is this, that where a man does a thing, *the probable and natural consequence of which* is the creating of a nuisance, he is answerable, although he did not *intend* to cause the nuisance. The rule of law, as established by all the cases, is, that the party *for whose profit* that is done which constitutes the nuisance, shall be answerable for it. There is no case in which a landlord has been held liable for a nuisance committed by his tenant for the *tenant's* benefit. In *Rosewell v. Prior*, the defendant was the party who originally created the nuisance, and he assigned the premises with the nuisance upon it, and therefore he was held liable for both the original nuisance created by himself, and the continuation of it by his assignee. The present case is very different. Here premises are let which are no nuisance in themselves, and of the erecting of which it is not a natural and probable consequence that they should become nuisances. It is only by the *misuse* that they became a nuisance, and for the *misuse* by his tenants the landlord is

(a) 4 T. R. 318.

(b) 3 Barn. & Adol. 184.

not liable. These tenants have been in the habit of cleansing the privies, from which it may be inferred that they had *contracted* with the landlord to do so.

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LORD DENMAN, C. J.—An owner receiving rent from his tenant in respect of that the natural consequence of the use of which is, that it should annoy the neighbours, must be answerable for the nuisance. This follows from *Rex v. Moore*, and other cases. The receipt of rent is an *upholding* of the nuisance, and makes the landlord liable for the continuance of it. The true way of considering this case is, to suppose that there were no buildings except the privies, and that for the use of them the landlord received a profit, as in fact he does now. Could any one doubt that, under such a view of the case, the landlord would be answerable?

LITLEDALE, J.—I think it is quite clear. If a man demises land with a nuisance upon it, and during the continuance of the term, and whilst the landlord was unable to remove the nuisance, another chooses to buy the reversion of the land with the nuisance upon it, he is answerable. If a man demises with no nuisance upon the land, and the tenant *commits a new nuisance*, the landlord is *not* liable. If there is a tenancy from year to year, and the tenant commits a nuisance, and the landlord renews<sup>(a)</sup> the tenancy during the continuance of the nuisance, the landlord is liable. He has no business to do so; and by doing it, he continues the nuisance. That, I think, is the law upon the subject. In the ordinary way in which these places are used, they are likely to become a nuisance unless there be a drain, or care taken to cleanse them frequently.

TAUNTON, J.—Looking at the evidence, I think that the privies are not actually demised. The use only is per-

(a) The landlord in effect renews the tenancy by refraining from exercising his option to determine it.

Qui non prohibet quod prohibere potest, assentire vel etiam facere videtur. *Vide* 21 Vin. Abr. 450, 508.



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mitted. If so, there is an end of the question, because the defendant might enter and remove. But supposing that he could not enter and remove, he has only to thank himself. I hold it to have been the duty of the landlord either to exact from his tenants an engagement that they would cleanse these privies, or to reserve to himself a right to enter for that purpose. It is a matter of public necessity that they should be cleansed.

WILLIAMS, J.—I entirely concur. The language and conduct of the defendant himself comes strongly in aid of what my brother *Taunton* has said, namely, that these privies are not actually let to any person. The defendant, when spoken to by the surveyor, said, that the commissioners might depend upon it that *he* would attend to it immediately, and that *he* would immediately set about it and see the nuisance removed. He never said that he had no right to enter.

Rule discharged.

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The KING v. WALSH.

A conviction under 6 *Geo.* 4, c. 110, s. 27, and 3 & 4 *Will.* 4, c. 55, s. 27, for detaining the certificate of a ship's registry, is bad, unless it states the purpose for which the certificate was wanted, and that the person who demanded it was the "proper" officer.

A CONVICTION under 6 *Geo.* 4, c. 110, s. 27 (a), and 3 & 4 *Will.* 4, c. 55, s. 27, for detaining a ship's register (which conviction had been removed by certiorari) stated:—

That on 12th April, 1834, *Wm. Briggs*, the owner of one half part, and ship's husband or manager, of the vessel called the "*Norwich Castle*," then lying in the river Ouse, at Selby, personally went before the Rev. *J. F.*, a justice of the peace, residing near to the place where the detainer and refusal thereafter mentioned was committed, and upon his oath informed the said justice, that the defendant at &c. did unlawfully detain a certificate of register of the

(a) As to this statute see *Bowen v. Fox*, 2 Mann. & Ryl. 167.

The 3 *Geo.* 4, c. 23, s. 3, does not cure an omission, in a conviction, of the statement of a circumstance necessary to constitute the offence.

said vessel, then lying in &c., at &c., and that the defendant "did then and there unlawfully and wilfully refuse and neglect to deliver up the said certificate of register to his majesty's officers of customs, for the purposes of such vessel, contrary to the statute in that case made and provided." The conviction then stated, that the justice issued his warrant to apprehend the defendant; that he was afterwards brought before the justice, who thereupon, in the presence of the defendant, proceeded to examine into the truth of the charge; and that one credible witness, to wit, *Wm. Briggs*, deposed, that the defendant then had the possession of the certificate of register of the said vessel, and that he wrongfully and illegally detained the same, and refused to deliver it up to his majesty's officers of customs, for the necessary purpose of the said vessel; and that the defendant then and there, in the presence of the justice, acknowledged and said, that he then had the possession of the said certificate of register of &c., and also, that he had refused and then did refuse to deliver up such certificate of register to the officers of his majesty's customs, for the purposes of the said vessel. Therefore, it manifestly appearing, &c.

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A rule nisi having been obtained to quash the conviction,

*Hoggins* now shewed cause. This conviction is founded on the 6 Geo. 4, c. 110, s. 27, which is amended by 7 & 8 Geo. 4, c. 56, s. 18. The 6 Geo. 4, c. 110, s. 27, makes it an offence, cognizable by magistrates, for any person wilfully to obtain and refuse to deliver up the registry of any vessel to the proper officers of his majesty's customs, for the purposes of such ship or vessel. It is objected to the form of this conviction, that the word "proper" is omitted. [Lord Denman, C. J. There is a later act, 3 & 4 Will. 4, c. 55. The conviction must have been under that statute.] The words of 3 & 4 Will. 4, c. 55, s. 27, are similar to those of the former statute, as far as they are material upon the present question. The answer to the objection made is this, that an allegation of a detainer

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from the *officers* of his majesty's customs, is a statement of a detention from *all*, and therefore includes the *proper* officers. It is to be presumed, that it was proved before the magistrates that the party *wilfully* detained the registry from the *proper* officer. [*Littledale*, J. If the conviction had merely alleged, that he "unlawfully detained the registry," would that have been sufficient?] It is contended that it *would* be sufficient; *Ex parte Edwards* (a). There *Edwards* had been committed to prison under the smuggling act (6 Geo. 4, c. 108), by which act (sect. 81) any person convicted under it, who was a seaman, might be carried on board any of his majesty's ships of war, and if on *examination by any surgeon of his majesty's navy*, within one week after being so carried on board, he should be deemed unfit, and on that account be refused to be received into his majesty's service, he should pay 100*l.*, and be committed to prison until payment. The warrant of commitment *omitted to state, that Edwards had been examined by a surgeon in the navy*; yet it was held good. [*Littledale*, J. Suppose the form of proceeding in this case had been an *indictment*, would it then have been sufficient merely to allege, that the party had *wilfully* detained the registry?] The conviction alleges a detention from *all* his majesty's officers of customs. [*Littledale*, J. There may be ten officers of the customs, two of whom have authority to demand, and eight have not.] If the proper officer did not demand the registry, that is matter of defence, and need not be stated in the conviction; *Fawcett v. Fowlis* (b). No form of conviction is given by the statute. The general form of conviction given by the 3 G. 4, c. 23, s. 3(c), has been adopted, and the third section of that statute enacts, that no conviction shall be quashed for want of form, and that a liberal construction shall be put upon it.

*Holt*, contra. There are two objections to the conviction. In the first place, it should have appeared that the

(a) 8 Dowl. & Ryl. 115.

7 Barn. & Cressw. 394.

(b) 1 Mann. & Ryl. 102; S. C.

(c) *Post*, 637, (a).

certificate was required for the *necessary* purposes of the ship; more especially in the case in which the defendant is a part-owner and manager of the ship—for the only necessary purposes for which one part-owner can require the ship's register from another, are a transfer, mortgage, or change of master.

In the second place, it should have appeared on the face of the conviction, that the demand was made by the *proper* officers, that is, by the collector and comptroller of the customs. [*Taunton*, J. How does it appear that the collector and comptroller are the proper officers?] By the third section. *Rex v. Pixley* (a).

Here he was stopped by the Court.

Lord DENMAN, C. J.—It ought to appear upon the face of the conviction *for what purpose* the register was required, and also, *what officer* made the demand, in order that the Court may see that the *purpose* was *necessary*, and that the *demand* was made by the *proper* officer. These facts do not appear on the face of this conviction, which is, therefore, bad at common law. The 3 Geo. 4 certainly requires that a *fair and liberal* construction, such as will be agreeable to the justice of the case, shall be put upon convictions where the merits have been tried—but it must appear on the face of the conviction, that an *offence* has been charged. The Court cannot import the circumstances necessary to constitute the offence. It has been said, that an allegation of a refusal to deliver up the registry to *the officers* of his majesty's customs, is an averment of a refusal to deliver it up to *all* the custom-house officers, and is, therefore, a statement of a refusal to deliver it up to the *proper* officer; but it is consistent with the allegation in the conviction, that the demand may have been made by an officer not authorized to make it, and for a purpose not contemplated by the statute.

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(a) 13 East, 91.

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LITLEDALE, J.—I am of the same opinion. The only *proper* officers to demand the registry are the collector and comptroller. There are subordinate officers of the customs. The demand may, consistently with that which is stated in this conviction, have been made by *them*. We cannot assume that it was made by the collector or comptroller. The general rule given in 3 Geo. 4, c. 23, s. 3, is, that convictions shall receive a *fair and liberal construction*; but that will not get rid of the difficulty. If it did so, it would obviate every possible objection to a conviction.

TAUNTON, J.—I am very clearly of the same opinion. No offence is committed under this clause, unless there be a refusal to deliver up to the *proper* officer of his majesty's customs. "Proper" *excludes* improper. It does not follow that because the party is to deliver it up to the *proper* officer, that therefore he is to deliver it up to *any* officer. It is a rule, with respect to convictions, that the *substance* of the offence should be stated in the conviction. The omission here is not matter of form; it is an omission in the description of the offence in a material and substantial part. This disposes of the point which has been made, that under 3 Geo. 4, convictions are not to be quashed for mere matters of *form*. Two cases have been cited, both of which are distinguishable from the present. The first is *Ex parte Edwards*. In that case the act directed that the justices, upon proof that the seaman convicted under that act had been refused to be received on board his majesty's ship, should, *without hearing any other evidence*, require the party to pay the penalty, or commit him to prison; and the commitment stated that fact. The commitment was therefore good, without stating, (as it was objected that it should have stated), that *Edwards* had been examined by a naval surgeon, and deemed unfit, and that, *therefore*, he was refused to be received on board. *Fawcett v. Foulis* is still less like the present. There, the conviction stated that the party had been called upon to do statute duty, *or to*

*compound*, and, omitting any mention of the non-payment of the *composition money*, alleged, that he had neglected to do the statute work, and was adjudged to be convicted of the same. The Court held, that the offence was the not doing the *statute work*, and that the payment of the *composition money* operated by way of defence. A decision upon one statute can scarcely be referable to another, because the language used in each is generally different. I am of opinion that the conviction is bad, for want of necessary *certainty* and *precision* in the description of the offence.

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WILLIAMS, J.—I am of the same opinion. The *purpose for which* the registry was wanted, and the *person by whom* the demand was made, ought to have been stated. It seemed to me that Mr. *Hoggins* felt, during the argument, that nothing could be said in support of the conviction, except the rule of construction given in the third section of 3 *Geo. 4*, c. 23. But that clause gives no aid, because it says, that a conviction shall not be vacated *for want of form*, where it appears, *by the conviction*, that the *merits have been tried* (a). Here it does *not* appear that the merits have been gone into. That clause of 3 *Geo. 4*, c. 23, is much too general to aid a case of this description.

The defendant was discharged.

(a) The words of the statute are, "That in all cases where it appears by the conviction that the defendant has appeared and pleaded, *and the merits have been tried*, and that the defendant has not appealed against the said conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards

be set aside or vacated in consequence of any defect of form whatever; but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case." It is evident that the word "*that*" is here misplaced, as it can never appear *by the conviction* whether the defendant has appealed against it.



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BAXTER and another, Assignees of HENRY BALL, a  
Bankrupt, v. PRITCHARD.

A sale to a bonâ fide purchaser, of the whole of a trader's stock in trade, with an intention on the part of the trader to abscond with the money and cheat his creditors, is not an act of bankruptcy.

**T**ROVER to recover the value of the stock in trade of the bankrupt, sold by him to the defendant in Dec. 1830. At the trial before *Denman*, C. J., it appeared that at the time of the sale, the bankrupt, who was greatly indebted, intended to abscond with the proceeds, without paying his creditors. The defendant was not aware of his intention, and had paid a fair price for the goods. Sir *James Scarlett*, for the defendant, contended that this was not an act of bankruptcy or a fraudulent transfer; and cited *Hill v. Farnell (a)* and *Cook v. Caldecott (b)*. The jury, under the direction of the Lord Chief Justice (who however gave the defendant leave to move for a nonsuit), returned a verdict for the plaintiffs. They expressly found fraud on the part of the bankrupt, and the absence of it in the conduct of the defendant. A rule nisi for a nonsuit having been obtained,

*Campbell*, A. G., and *Follett*, in Easter term, shewed cause. There was no moral fraud on the part of the purchaser; but the question for the Court is this, whether a trader who, being largely indebted, sells to a bonâ fide purchaser all his effects, with an intention of absconding with the proceeds and thus cheating his creditors, thereby commits an act of bankruptcy. By 6 *Geo. 4*, c. 16, s. 3, if any trader shall make any fraudulent grant or conveyance—or any fraudulent gift, delivery or transfer—of his goods or chattels, every such trader doing such acts *with intent to defeat or delay his creditors* shall be deemed to have committed an act of bankruptcy. This was either a fraudulent *grant* or a fraudulent *transfer*, within the meaning of the section. Although not fraudulent *in fact* as between the buyer and seller, it was a fraud *on the bank-*

(a) 9 Barn. & Cressw. 45.

(b) 1 Mood. & Malk. 522.

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*rupt laws.* Whether a deed is fraudulent within the meaning of the Bankrupt Act, depends upon the intention of the *grantor*. Thus, a voluntary preference by a trader in favour of a particular creditor, is fraudulent within the meaning of the bankrupt laws, although the person preferred conducts himself with perfect good faith. If the creditor of a trader demands and obtains payment, knowing that his debtor is in a state of insolvency, that is *not* a fraudulent preference; yet it might be said that there was bad faith on the part of the creditor. The cases which were decided upon the former Bankrupt Acts, as to fraudulent assignments by deed, are in point. The only difference between the former Bankrupt Acts and the present is, that formerly a *deed* was necessary to make a fraudulent transfer an act of bankruptcy, the word *grant* being used, whereas now no deed is necessary. The present act makes that an act of bankruptcy which was formerly a fraudulent preference only. Under the former acts, deeds which were considered as fraudulent were divided into two classes: First, those which were void by the common law, or by force of the statute of fraudulent conveyances, 13 *Eliz.* c. 5, in which it was necessary that there should be fraud by *both parties*: And, secondly, such as were considered fraudulent as being a contravention of the policy of the bankrupt laws; in which latter class it was not necessary, in order to make the deed void, that there should be fraud on the part of the grantee. [*Patteson, J.* In all the cases you refer to, there was fraud in law, though not in fact.] If a trader assigns so much of his property as to disable himself from carrying on his trade, this is an act of bankruptcy. Where a trader assigns *all* his effects for the benefit of *all* his creditors, it is an act of bankruptcy, because it prevents his carrying on his trade, and is, to use the words of Lord *Mansfield*, an *assignment of his solvency* (a). [*Patteson, J.* Where a trader assigns *all* his effects for the benefit of his

(a) Eden's Bankrupt Law, 26.



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creditors, he gets no *money* in return. Here, with the produce of the sale he could have carried on his trade. Suppose a trader, about to relinquish his business, offered his stock in trade for sale,—is the purchaser to inquire whether or not he is solvent? No one, it is submitted, ought in prudence to purchase the whole of a trader's effects. There is a great difference between the case of a trader selling a *portion*, and that of his selling the *whole* of his effects. The cases cited at the trial are distinguishable from the present. In *Cook v. Caldecott (a)*, a sale by a trader was held not an act of bankruptcy, because a *portion* only of the trader's goods were sold. In *Hill v. Farnell (b)* the question whether the sale was an act of bankruptcy did not arise. The object of the Bankrupt Act was to prevent the trader from defrauding his creditors. [*Patteson, J.* He does not commit the fraud by the assignment: he does that by another act,—running away with the money. *Little-dale, J.* Suppose the bankrupt had changed his mind, and had remained? If he had altered his intention, it would still have been an act of bankruptcy, as it is the bankrupt's intention at the time of the assignment that is to be regarded; and here the intent is found by the jury. [*Patteson, J.* In all the cases you mention, the fraud on the creditors was the effect of the assignment. Have you any case in which a *bonâ fide* sale was held to be an act of bankruptcy? No precise authority to that effect has been found.

Sir *James Scarlett* and *Hutchinson*, in support of the rule. There is no case in which an assignment upon a *bonâ fide* sale has been deemed an act of bankruptcy. [*F. Pollock, amicus curiæ*, mentioned a case of *Rose v. Haycock (c)*.] The words of the statute are, “any fraudulent grant or fraudulent transfer, with intent to defeat or delay credi-

(a) 1 Mood. & Malk. 522.

(c) See *post*, 645.

(b) 9 Barn. & Cresaw. 45.

tors." To make a transfer of a trader's property constitute an act of bankruptcy, two circumstances must concur—it must be a *fraudulent* transfer, and there must be an intent to delay creditors. The transaction in this case was not *fraudulent*. A transfer by way of sale cannot be considered fraudulent, where the purchaser acts with good faith and pays a full consideration. If a sale of this description is an act of bankruptcy, a man who sells a portion of his effects in order to live abroad and defraud his creditors, will by so doing commit an act of bankruptcy. It would be dangerous to purchase any large quantity of goods from a trader. It is said, that where a trader sells his whole stock in trade, the purchasers must make an *inquiry* for the purpose of ascertaining his *intentions* with regard to his creditors. If so, it will be necessary to make the same inquiry when *part* only be sold. [*Patteson*, J. The argument assumed that the whole stock in trade was sold.] There is no distinction in the statute between a sale of the *whole* and a sale of *part*. A contract to be *fraudulent* must be *fraudulently* entered into by *both* parties. The *intention of the trader* with respect to the purchase-money, when he shall have got possession, cannot affect the question of fraud *as affecting the contract*. The cases with respect to fraudulent preferences do not apply. In the case of a fraudulent preference, the debtor parts with his money without consideration, and by that means the funds to be divided amongst his other creditors are diminished. In *Whitwell v. Thompson (a)*, Lord *Kenyon* says, "all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been, where it had been given for a by-gone and before contracted debt; but that it never can be taken to be law, that a trader cannot sell his property when his affairs become embarrassed, or assign them to a person who will assist him in his difficulties, as a security for any advances such person may make to him." [Lord *Denman*, C. J.

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(a) 1 Esp. N. P. C. 68.

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There the money was advanced to the bankrupt, to assist him through his difficulties. Here, he obtains it in order to enable him to abscond and defraud his creditors.]

*Cur. adv. vult.*

In the course of this term the judgment of the Court was delivered by

LORD DENMAN, C. J.—The question is, whether an assignment by a trader of his whole stock, with intent to abscond and carry off the purchase-money, is an act of bankruptcy,—as “a fraudulent transfer and delivery of his property with intent to defeat and delay his creditors,”—when the purchaser pays a fair price for the goods, and is ignorant of the trader’s design.

The case being new, I thought myself bound to adhere to the words of the act, and considering that all acts of bankruptcy are made to depend on the *conduct and motives of the bankrupt* alone, and that in one sense *Ball’s* sale of his property to the defendant was clearly fraudulent, I directed the jury to find a verdict for the plaintiffs, with leave to move for a nonsuit.

The case has now been fully argued before us, and my first impresssion was rather fortified than weakened, by a scrutiny of the older cases, in which Lord *Mansfield*, and other contemporary judges of high authority, appear to have held that the mere assignment of a trader’s whole property by deed, was an act of bankruptcy, as disabling him from further carrying on his trade, though for a good consideration, and even with the praiseworthy motive of fairly distributing it among his creditors. It is enough to allude generally to *Worseley v. Demattos* (a), *Compton v. Moore* (b), *Law v. Skinner* (c), *Devon v. Watts* (d), *Hassells v. Simpson* (e), *Butcher v. Easto* (f).

(a) 1 Burr. 467.

(b) 1 W. Bla. 362.

(c) 2 W. Bla. 996.

(d) 1 Dougl. 86.

(e) Ibid. 89.

(f) Ibid. 295.

On further consideration, I am satisfied that my first impression was wrong, and I agree with the opinion which has been formed by the rest of the Court. If the language of the clause be construed with strictness, it is not *the transfer and delivery of the goods* that can be called fraudulent in any sense. The trader is *bound* to deliver the goods which he has sold for valuable consideration, receiving in return for them a fund of equal value, which might be made available for the benefit of his creditors. Possibly the best thing for them, would be the conversion of goods into money. It is remarkable that the word *sale* does not occur in this clause, and equally so that none of the older cases turn on a sale *accompanied with payment of the full price*. In *Hill v. Farnell* (a), the Court held that where a part of the property had been sold by a trader after an act of bankruptcy, but *bonâ fide* bought, the purchaser could not be compelled to part with the goods, unless the assignees, at least, tendered the price which had been paid. It was there justly said, that the protecting words of the 82d section could not otherwise receive their full effect. The incongruity would indeed be monstrous, if the purchaser were to be at liberty to keep goods so obtained, if a previous act of bankruptcy had been committed; but that if *no* previous act of bankruptcy had been committed, he should be disabled from keeping goods, and even from recovering a dividend on the price he had *bonâ fide* paid. Another great inconvenience was forcibly pointed out: as the transfer and delivery of *any part* of the property may be by the statute an act of bankruptcy, a trader carrying on business in the ordinary way might be made a bankrupt by a regular sale in his shop, by proof, subsequently obtained, that he had formed a scheme for cheating his creditors of the money, and in that case the unfortunate purchaser must both yield up to the assignees the article bought, and lose his right of proving under the commission. These startling consequences (which would perhaps war-

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rant some degree of violence to the wording of a law) will be avoided by confining the epithet "fraudulent" to the gift transfer or delivery of *the goods*, and not extending it to the projects which possibly the trader may entertain as to the disposal of *the purchase-money*.

Whatever authority exists on the subject, coincides with this view. Mr. Pollock informs us of a case (a), decided at

(a) ROSE v. HAYCOCK.\*

A fair and bona fide sale of the whole of a trader's property, is not, of itself, an act of bankruptcy.

The party who impeaches the sale of the whole of a bankrupt's property, must shew some acts from which fraud may be inferred.

THIS was an action of trover, tried before Mr. Baron Hullock, at Lancaster, at the spring assizes, in 1827.

The question was, whether a deed, by which a trader sold the whole of his property, was, of itself, an act of bankruptcy, independently of any question of fraud. By the deed in question, the bankrupt had assigned all his share in the stock in trade for a sum of money, which was paid to him. Two days before this, the lease of the premises wherein the business was carried on had been sold, so that the bankrupt had incapacitated himself from carrying on his business. The purchaser was the bankrupt's father. There was evidence that a letter had been seen by the father a short time before the purchase, which would indicate that the son was embarrassed. But the plaintiff's counsel did not impute fraud, nor was he able to shew that the purchase-money was improperly distributed. He contended that, in point of law, the sale was an act of bankruptcy. The learned judge was of opinion, that it was not of itself an act of bankruptcy; that there must be some evidence to shew fraud, or something from which the jury might fairly conclude that the transaction was not *bonâ fide*. The counsel for the plaintiff declined addressing the jury, and the learned judge directed the plaintiff to be nonsuited.

F. Pollock, in Easter term, 1827, moved for a rule nisi for a new trial. This sale cannot be allowed by law. If it is an act of bankruptcy for a trader to *assign* all his property for the purpose of a *just distribution* among all his creditors, à fortiori it must be such an act to *sell* all his property, by which he becomes enabled to pay whom he pleases. He thus sells himself up; and the very circumstance is enough to put a buyer on his guard. Here, there were debts to the amount of 10,000*l.*, and the purchase-money was not equal to that sum.

Lord TENTERDEN, C. J.—The sale was not in point of law, and of itself only, an act of bankruptcy. The words of the Bankrupt Act, 6 Geo. 4, c. 16, s. 3, are, "if any such trader shall make any fraudulent

\* The editors have been favoured by Mr. Barstow with this report of the case, from a note taken by him at the time.

Nisi Prius by Baron *Hullock*, in 1827, where the mere fact of selling the whole stock in trade was held to be no act of bankruptcy without proof of fraud. That learned judge nonsuited the assignees, and Mr. *Adolphus* has furnished a note of the refusal by this Court to set aside the nonsuit. In *Cook v. Caldecott* (a), Lord *Tenterden* left it substantially to the jury to say, whether the purchaser was *aware* of the trader's intention to defraud his creditors of the money raised by sale of portions of his stock in trade. *Hill v. Farnell* (b) points the same way, and supplies the powerful argument to which allusion has been made. And the Master of the Rolls (c) recently decided the case of *Robinson v. Carrington* (d), on the same principles.

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For these reasons we are of opinion that the sale of a tradesman's stock to a *bonâ fide* purchaser, who pays the fair price for it, in ignorance of any fraudulent intention of the seller, is no act of bankruptcy.

The rule for entering a nonsuit must be absolute.

Rule absolute.

grant or conveyance of any of his lands, tenements, goods or chattels." The utmost that could be contended for by a party who sought to impeach it, would be, that it should go to the jury upon the question of fraud; and then, in such a case as the present, it should go to them with a strong observation on the want of any facts from which fraud could be properly inferred. Even an *assignment* for the benefit of creditors is not now an act of bankruptcy, except in certain cases mentioned in the fourth section. A fair and *bonâ fide* sale is scarcely within the mischief for which the Bankrupt Act proposes a remedy.

By the Court—

Rule refused.

(a) 1 Mood. & Malk. 522.

(c) Sir *John Leach*.

(b) 9 Barn. & Cressw. 45.

(d) 1 Mont. & Ayrton, 1.

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DOE on the demise of POOLE and another v.  
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The nominal plaintiff in ejectment cannot recover upon a joint demise by persons who, upon the evidence, appear to be tenants in common.

Where the declaration in ejectment was on a supposed joint demise by A. and B., and it appears in evidence that A. and B. had not such an interest that they could join in a demise to the nominal plaintiff: *Taunton, J.*, at nisi prius, refused to amend the declaration under 3 & 4 Will. 4, c. 42, s. 23, by severing the demises.

The Court in banc cannot control the discretion of a Judge at nisi prius as to directing amendments of the record.

**EJECTMENT** to recover houses and lands in the county of Northumberland. At the trial, before *Taunton, J.*, at the last Northumberland assizes, it appeared that the lessors of the plaintiff claimed under a will in which the property was devised to them as "*tenants in common, and not as joint tenants.*" *Cresswell* and *Alexander* for the defendant applied for a nonsuit on the ground that tenants in common could not demise *jointly* to the nominal plaintiff in ejectment. *Coltman*, contra, contended that they might join in a demise, which would operate as a demise of their *several* and respective interests; and he also applied to amend the declaration, under 3 and 4 Will. 4, c. 42, s. 23. The learned judge thought the objection good; and that he had no authority to amend, as he could not say that the variance between the proof and the record was "in a particular not material to the merits of the case." The plaintiff was therefore nonsuited.

In Easter term, *Coltman* obtained a rule nisi for a new trial; against which

*Cresswell* now shewed cause. Tenants in common cannot join in a demise to the nominal plaintiff in ejectment. Tenants in common come to their lands *by several titles*, and *not by one joint title*, *Littleton*, sect. 292; and this is the reason why the Courts have held that they cannot join. In *Littleton*, sect. 311, it is said, "Also in some cases tenants in common ought to have of their possession several actions, and in some cases they shall join in one action. For if two tenants in common be, and they be disseised, they must have *two assizes* and *not one assize*; for each of them ought to have *one assize of his moiety*, &c. And the reason is, for that the tenants in common were seised &c. *by several titles*. But otherwise it is of joint-

tenants; for if twenty joint-tenants be, and they be disseised, they shall have in all their names but one assize, because they have not but *one joint title*." Lord Coke<sup>(a)</sup> says, that from this section it is learnt "that in all real actions, and in actions also that are mixed with the personally, tenants in common shall sever in action, because they have several freeholds, and claim in by several titles; and therefore as they shall be severally by others impleaded, so shall they severally implead others in all real and mixed actions, unless it be in case of necessity for a thing entire," e.g., in case of an assize for a hawk or a horse, of which a man cannot recover the moiety, (Co. Lit. 197, a.) Tenants in common must *distrain separately*. It was said, on moving for this rule, that tenants in common might together make a tenant *who* might demise to John Doe. Be that so. It does not follow that they may join in a demise to John Doe. [Lord Denman, C. J. If they may join in making a lease, why may not John Doe be the lessee?] Because he must recover in right of his lessor's title. In the case of a lessee of tenants in common making a demise to John Doe, he seeks to recover in right of such lessee. In Buller's N. P. 106, b., it is said, that "if there be several lessors (in ejectment) and you lay in your declaration *quod demiserunt*, you must shew in them such a title that they might demise the whole." Afterwards it is there said, that "if the plaintiff were to declare upon a lease made by A. and B., and it were to appear upon the trial that A. and B. were tenants in common, it would be bad; but it would be otherwise if they were joint tenants; and the reason of the difference is, that tenants in common are in of several titles, and therefore the freehold is several, and consequently each of them cannot demise the whole: but joint-tenants are seized *per my et per tout*, and therefore each may be said to demise the

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(a) Co. Lit. 195, b.



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whole (a). *Mantle v. Wollington* (b) was an action of ejectment upon a lease by two who upon the trial appeared to be tenants in common, and it was held by three judges against one that the declaration was ill; for the plaintiff ought to have declared *upon several leases of their several parts*; *Morres v. Barry* (c), *Boner v. Juner* (d). In *Roe d. Raper v. Lonsdale* (e), and *Doe d. Marsack and others v. Read* (f), it was decided that where *one joint-tenant* brings ejectment, or makes a separate demise in ejectment, he by that very act severs the title, and thus makes himself a tenant in common. These cases, though not direct authorities, support the rule which is now contended for,—that persons who are in by several titles cannot join in a demise to the nominal plaintiff in ejectment. In the latter of those cases the Attorney-General, as *amicus curiæ*, said, that “the rule was formerly considered to be, though he had never heard any reason assigned for it, that in laying demises in ejectment, tenants in common must sever, joint-tenants must join, and parceners might either join or sever. But if *joint-tenants might sever*, it seemed difficult to say, why tenants in common *might not join*, as each might still be taken to have demised according to his legal interest.” The Attorney-General was wrong in saying that the rule had been that joint-tenants *must* join; and it does not follow, as he seemed to suppose, that tenants in common *may* join because joint-tenants *may sever*, unless it can be shewn that tenants in common, *by the act of joining in ejectment*, become joint-tenants.

*Alexander*, (with whom was *W. H. Watson*,) on the same side, was stopped by the Court.

(a) Joint-tenants are seised of aliquot parts for the purposes of merger (*Preston on Merger*, 474,) and of alienation, (*Litt. title Tenants in Common*.)

(b) *Cro. Jac.* 166.  
 (c) 1 *Wils.* 1; 2 *Str.* 1180.  
 (d) 1 *Lord Raym.* 726.  
 (e) 12 *East*, 39.  
 (f) *Ibid.* 57.

*Coltman*, in support of the rule. At the time when the cases, which have been cited as shewing that tenants in common must sever, were decided, the action of ejectment was a real and not a fictitious action. A real lease was made and brought into Court, and objections of variance between the lease and the declaration were open to the parties. In *Treport's case*(a), and *Mantlev. Wollington*(b), the Court decided on the ground of a *variance* between the declaration and the legal effect of the deed as executed by the parties; and this is clearly the principle upon which all the old cases proceeded. Now, the only question in actions of ejectment is a question of *title* merely, and no question of variance between the demise and the declaration can arise. In *Doe d. Gill v. Pearson*(c), which was ejectment by one of several coparceners, the plaintiff was allowed to recover *one-eighth* of certain lands, when by his declaration he had claimed a *moiety*. This could not have been according to the old rules, for if a party had laid in his declaration a demise of a moiety, and was shown to be entitled to one-eighth only, this would have been a *variance*; because the *effect* of his *lease*, whatever its terms might be, would be to demise the one-eighth only. The action of ejectment has become now a mere mode of trying the title, and therefore the strict objections that were formerly fatal, will not now be recognized by the Court. In *Doe d. Shore v. Porter*(d), the declaration was on a supposed demise for seven years by the plaintiff as administratrix of one *William Shore*.—It appeared that *William Shore* had been undertenant to the defendant, but no lease in writing was produced; and upon demurrer to the evidence, it was contended that the intestate must be taken to have been tenant from year to year, and that therefore his administrator had not such a quantity of interest as would support a demise for seven

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(a) 6 Co. Rep. 14 b.

(c) 6 East, 173.

(b) *Ante*, 648.

(d) 3 T. R. 13.

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years, especially as against his landlord, to whom the reversion belonged. In the course of that argument the counsel cited *Roe v. Williamson* (a), which was ejectment on a demise for five years, and in which it was said to have been held that the declaration was bad, because it appeared in the evidence that the lessor of the plaintiff had only a lease for three years. The Court overruled the objection, and Lord *Kenyon*, C. J. in delivering his opinion said, "The interest of the plaintiff cannot be in any manner affected by the length of time stated in the declaration in ejectment; the whole of which is an absolute fiction." In *Doe d. Lulham v. Fenn* (b), the declaration was upon three several demises of the whole, by three persons, who, it appeared, had jointly demised to the defendant for a term which had expired. It was objected that the declaration should have been upon a joint demise by the three, but Lord *Ellenborough* overruled the objection, saying, that "by the three separate demises, the nominal plaintiff must be considered to have the same interest in him which was formerly conveyed to the defendant by the lease which has expired." If joint-tenants may recover in ejectment in which a demise of the whole by each is laid, why may not tenants in common as well recover upon a joint demise, as was suggested by *Gibbs*, A.G. as *amicus curiæ*, in *Doe v. Read* (c)? In both cases the whole declaration is a fiction, and the plaintiff recovers according to the interests of the lessors. In *Denn v. Purvis* (d), which was ejectment on the supposed demise of a *moiety* of certain lands by a lessor who appeared in evidence to be entitled to *one-third* only, the Court held that the plaintiff might recover so much as his lessor appeared to be entitled to, and Lord *Mansfield* observed, that the rule was undoubtedly right "that the plaintiff must recover *according to the title*." If these had been real proceedings this case would have been precisely within the statute of amendments, so that the plain-

(a) 2 Lev. 140; 3 Keb. 490.

(b) 3 Campb. 190.

(c) *Suprà*, 648.

(d) 1 Burr. 326.

tiff would have been entitled to amend at the trial. [*Littledale, J.* We cannot control the discretion of the judge at nisi prius.] The observation was not made with a view to obtaining permission to amend, but merely for the purpose of grounding an argument, that as the declaration is now treated so much as a fiction that the parties cannot have the benefit of the statute of *amendments*, the strict rules of former times as to *variances* ought not to be enforced.

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LORD DENMAN, C. J.—The old law which obtained when there was a real demise to the plaintiff in ejectment, is not altered; and there is a very good reason for it, for the titles of tenants in common are several. You might as well, it seems to me, lay a joint demise by *any* parties with perfectly distinct titles as by tenants in common.

LITLEDALE, J.—The old law was, that in all real actions tenants in common must sever; and when the mode of recovering land became a *mixed* action the same rule continued. I do not see why, because the action of ejectment has become in a certain degree fictitious, we must depart from the old law in this respect.

TAUNTON, J.—I am of the same opinion. In addition to the authorities which have been cited in support of the rule that tenants in common must sever in ejectment, there is another referred to in *Selwyn's Nisi Prius* (a), which is that of *Blackasper's* case, Noy, n. 43, Hal. MSS. It is as follows:—"Declaration in ejectment was of a joint demise of A. and B., and on the evidence it appeared that they were tenants in common; the plaintiff failed."

WILLIAMS, J. concurred.

Rule discharged (b).

(a) Vol. ii. p. 708.

ejectment puts in issue all the

(b) The plea of Not Guilty in allegations in the declaration :

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These are, the demise to the plaintiff—his entry—and his ouster by the defendant.

According to the old practice, these allegations so put in issue would be proved as in other actions. The demise would be supported by proof of a lease, corresponding in legal effect with the demise laid in the declaration.

Where the demise stated in the declaration was a joint demise by *A.* and *B.*, it would not be sufficient to produce a lease *purporting* to contain such joint demise, unless it also were shewn that *A.* and *B.* had such an estate as would *enable* them to demise jointly. If, therefore, the lease produced to support the allegation of a joint demise by *A.* and *B.* contained that which purported to be joint demise by *A.* and *B.*, but it was shewn that *A.* and *B.* were tenants in common, the apparently joint demise would enure as several demises by *A.* and *B.* of their respective purparties, and the declaration would be as effectually disproved as if the demise in the lease had been in its terms several. But if a plaintiff in ejectment declared on the *several* demises of *A.* and *B.*, and produced a lease or leases purporting to contain such several demises, the declaration would not be disproved by shewing that *A.* and *B.* were joint-tenants; because it is competent to joint-tenants to demise severally or jointly, at their election.

So, if the defendant, instead of availing himself of the general issue, had chosen to admit the entry and ouster, by pleading only *non dimisit modo et formâ*, though the fact of the demise would alone

be put in issue, it would be competent to the defendant (inasmuch as the plaintiff had not stated the title of his lessors to demise, and thereby afforded the defendant an opportunity of traversing or admitting that title,) to shew that the lease produced in support of the demise did not operate in the way it purported to operate, by reason of a want of capacity in the lessors to give it that operation, *post*, 676(a). In either case the proof of the lessor's title would lie upon the plaintiff; as the mere production and proof of the execution of a lease from *A.* and *B.* would not raise even a presumption, *as against a stranger*, of a title in *A.* and *B.* to demise.

In modern practice, the demise laid in the declaration, though equally put in issue by the plea, is proved, not by direct evidence, but by the admission of the defendant, made (or presumed to be made) by him at *nisi prius*, in pursuance of the consent-rule, whereby he has undertaken to admit lease, entry, and ouster, and to insist on title only. By the consent-rule, however, the defendant must not be understood as undertaking to admit the execution of a *valid* lease, as such an admission would make a *prima facie* case for the plaintiff, and would compel the defendant, even in the first instance, to set up an adverse title in himself. The defendant only agrees to admit the existence *in fact* of a demise corresponding with that laid in the declaration, leaving the legal operation of that demise in fact to depend upon the title of the alleged lessor; thus placing the plaintiff in the same

situation as he would have been in under the old system, after proving the execution, by the lessor, of a deed or instrument purporting to demise in the terms of the demise in the declaration. The same objections, in respect of the capacity to make the demise laid in the declaration, will therefore remain open to the defendant as if the old system was now in force.

If two tenants in common make a lease for life rendering rent, the reservation, *though made by joint words*, will follow the nature of the reversion, which is *several*; Co. Lit. 197 a; *Knight's case*, Sir F. Moore's Reports, 199, 202; *Malory's case*, 5 Co. Rep. 111 b.

The following passage from 3 Bacon's Abridgment, *Joint-Tenants*, (K) seventh edition, page 705, is in accordance with the decision in the principal case.

"Although regularly joint-tenants are to join and be joined in an action, yet it is otherwise with tenants in common; and therefore if in ejectment the plaintiff declares on a lease made by A. and B., and on the trial it appears that they are tenants in common, the plaintiff cannot recover; but if A. and B. had been joint-tenants, a joint-lease to the plaintiff had been good, and he might have declared *quod demiserunt*; and the reason of the difference is, that tenants in common are (in) of several titles, and therefore the freehold is several; and if they are disseised, they shall be put to their several actions; as, therefore, the lands of

tenants in common are to be considered as different estates depending on different titles, the plaintiff shall not recover, because that were to allow the plaintiff to try two several and different titles in one issue at the same time, and therefore the plaintiff, to make out his title, must shew and prove that each demised the whole to him, or else he doth not prove the declaration; whereas the discovery of the tenancy in common proves the contrary; and as they have different titles to a moiety only, so they could not each of them demise the whole; but joint-tenants are seised *per mie et per tout*, and they derive by one and the same title, and therefore each may be said to demise the whole; and as they must join in an action for any violation of their possession, so, for the same reason too, their lessee on their joint demise."

In support of these positions, *Moore v. Fursden*, 1 Shower, 342, 2 Ventris, 214, Comberb. 190, and Carth. 224; *Blackborough v. Graves*, 1 Mod. 102; Co. Lit. 200; *Heatherley v. Weston*, 2 Wils. 232, are cited. But though these authorities all tend to shew that ejectment will not lie on the joint demise of tenants in common, the reason of the difference given above is to be ascribed to the editor of the Abridgment alone, who, though right in his conclusion, is not justified by his authorities in treating the power of *demising* jointly as necessarily dependent upon the power of *suing* jointly.

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JOHNSON v. BRASIER, Clerk.

Where the defeazance of a warrant of attorney to confess judgment executed by *A.* a beneficed clergyman, states that it is given to secure to *B.* the payment of an annuity granted by *A.* to *B.* for his life, described in a certain indenture of even date between the said *A.* and *B.*—that in the indenture it was agreed that judgment should be entered up on the warrant of attorney, but that no execution should issue until the annuity should have been in arrear fourteen days after any of the days for payment expressed in the indenture, but that if the annuity should be so in arrear, *B.* might sue out such execution

IN Easter term, *R. V. Richards* (on behalf of the Lord Bishop of *Hereford* and the sequestrator appointed by the bishop to receive the profits of the living under a sequestration granted to the plaintiff in this action), obtained a rule under the interpleader act (*a*), calling upon the plaintiffs and one *Thomas Mytten* respectively to appear before the Court and state the nature and particulars of their respective claims to the goods seized in execution under certain writs of *levari facias*, and maintain or relinquish the same, and to shew cause why the Court should not make such order respecting the same as to it should seem fit, and that in the meantime proceedings against the Lord Bishop of *Hereford* and the sequestrator should be stayed. This rule was granted upon the affidavit of the sequestrator, which stated that writs of *levari facias* had issued in behalf of the plaintiff and *Mytten*, and that sequestrations had been granted upon them by the bishop; that the plaintiff's writ of *levari facias* and his sequestration were of prior date to those of *Mytten*, and were not satisfied; but that *Mytten* had claimed to be entitled to the profits of the living immediately, on the ground that the plaintiff's execution was invalid. Affidavits stating the nature and particulars of their respective claims were sworn on behalf of the plaintiff and *Mytten* respectively. The affidavit of Mr. *Beck*, the plaintiff's solicitor, stated as follows:

The writ of *levari facias* in this cause was issued under a judgment signed on behalf of the plaintiff on a certain warrant of attorney, and was issued for the purpose of compelling payment of the *arrears* of the annuity for which the

(*a*) 1 & 2 Will. 4. c. 58, s. 6.

upon or by virtue of the judgment, as he should think fit, for the recovery of the arrears and all costs; the Court cannot, upon a question as to the validity of a sequestration granted by the bishop in pursuance of a writ of *levari facias* issued upon the judgment entered up on the warrant of attorney, look at the indenture for the purpose of deciding whether it operated as a charge upon *A.*'s benefice.

*said warrant of attorney was given as a security. The warrant of attorney, which was set out in the affidavit, was to confess judgment for 1600*l.* The defeazance stated that the warrant of attorney was given to secure to the plaintiff, his executors &c. the payment of an annuity of 95*l.* granted by the defendant for his life, described in a certain indenture bearing even date therewith, and made between the defendant and the plaintiff, in which indenture it was agreed that judgment should be entered up upon the warrant of attorney, but that no execution should issue upon the judgment until the annuity should be in arrear and unpaid by the space of fourteen days after any of the days expressed in the indenture for payment thereof, but that if the annuity should be in arrear and unpaid as aforesaid, it should be lawful for the plaintiff, his &c., to sue out such execution or executions upon the judgment as he should think fit for the recovery of the arrears of the said annuity, and all extra premiums &c., and all loss, costs, &c., to which the plaintiff &c. should be put by reason of the non-payment of the annuity or otherwise on account thereof. The annuity deed referred to in this defeazance was not set out or further noticed in the affidavit.*

No question arose as to the validity of the execution issued on behalf of *Mytten*.

Sir *J. Scarlett*, for *Mytten*, contended that as the warrant of attorney referred to and was connected with a deed granting an annuity, to secure payment of which that warrant of attorney was given, he had a right to assume that the deed was a charge upon the benefice; and that the affidavit of Mr. *Beck* ought to have brought the deed before the Court, which not being done, the Court had not the materials upon which to come to a final decision.

*Adams*, Serjt., for the plaintiff, contended that the warrant of attorney was good upon the *face* of it, and that

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the reference to the deed did not make it necessary, or even authorize the Court to look out of the warrant of attorney itself; *Flight v. Salter* (a), *Gibbons v. Hooper* (b), *Britten v. Wait* (c), *Colebrook v. Layton* (d).

The Court stopped *Follett*, on the same side, saying that no ground had been laid for impeaching the validity of the plaintiff's sequestration.

*Adams*, Serjt., applied to the Court to direct the sequestrator to pay to the plaintiff the money now in his hands, and all future proceeds of the benefice, until the whole of the arrears should have been paid off.

*Per Curiam.*

Rule accordingly.

(a) 1 Barn. & Adol. 673.

(d) *Ante*, vol. i. 374; 4 Barn.

(b) 2 Barn. & Adol. 734.

& Adol. 578.

(c) 3 Barn. & Adol. 915.

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SALTMARSHE v. HEWETT, Clerk.

SKRINE v. Eundem (e).

A warrant of attorney, which appears upon the face of it to be to secure the payment of an annuity charged upon an ecclesiastical benefice, is void, under 13 *Eliz.* c. 20.

**CAMPBELL**, A. G., had, in Easter term, obtained a rule, calling upon the plaintiff to shew cause why a warrant of attorney, and the judgment and sequestration thereon, should not be set aside, on the ground that the warrant of attorney operated to charge the living, and therefore was

(e) Two other rules obtained by the defendant, in which the warrants of attorney were respectively in the same form, in respect of other annuities, were disposed of at the same time.

The Court will set aside a warrant of attorney, judgment and execution, where the defeazance of the warrant of attorney recites the grant of an annuity by *A.* to *B.*, rector of *R.*, (cum curâ animarum,) intended to be secured by an indenture, "*whereby A. had charged the annuity upon the rectory of R.*;" and that it had been agreed that such annuity should also be secured by that warrant of attorney; and that no execution should issue until twenty-one days' default in payment of the annuity, in which case *B.* might, toties quoties, sue out *such execution as he should think fit, and also sequester the rectory*, to the intent that *B.* might recover the arrears.

void, under 13 *Eliz.* c. 20. Upon the respective affidavits the following facts were stated :

23d June, 1821. A warrant of attorney to confess judgment for 3,600*l.*, was executed by the defendant. The defeazance recited the purchase of an annuity of 244*l.* 10*s.* for 1,800*l.*, by the plaintiff from the defendant, and that the annuity was intended to be secured by a bond of even date in the penal sum of 3,600*l.*, and by an indenture, also of even date, whereby the defendant had "charged the said annuity upon the rectory of Rotherhithe, and the glebe lands," &c. and that it had been agreed, that the annuity should also be secured by a warrant of attorney, to confess judgment in an action of debt in K. B. for 3,600*l.*, in pursuance of which that warrant of attorney had been executed. It was then declared, that the judgment to be entered up was intended to be a collateral security only, for the payment of the annuity; and that no execution should issue until some payment of the annuity, or some part thereof, *should be in arrear* for twenty-one days. Proviso, that if the annuity *should be in arrear* for twenty-one days, *then and so often as it should happen*, it should be lawful for the plaintiff, his executors &c., to sue out *such execution or executions*, upon the said judgment, *as he or they should think fit* or be advised, and *also to sequester the said rectory* of R., and all and singular any of the glebe lands &c., to the intent that by virtue of all or any of the ways aforesaid, the plaintiff, his executors &c., *might recover the arrears* of the annuity, and all costs &c.

17th July, 1821. Judgment was signed; but no execution was issued nor was any other proceeding taken upon the judgment until 10th April, 1834, when a *fi. fa.* issued to the sheriffs of London, who returned *nulla bona*, and certified that the defendant was the beneficed clerk of Rotherhithe, in the diocese of Winchester; whereupon,

18th April, 1834, a *fi. fa. de bonis ecclesiasticis* issued to the Bishop, indorsed to levy 1,202*l.*, besides &c., for

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*certain arrears* of the annuity. The arrears then due amounted to 1,200*l.*, and the plaintiff's costs were 2*l.*

*R. V. Richards and Follett*, shewed cause. The Court cannot set aside *the warrant of attorney and judgment* in this case. The only question is, whether they can set aside the *sequestration*; and this will turn upon the terms of the defeazance; from which it appears that the warrant of attorney only authorizes the plaintiff to sequester the living for *the arrears* of the annuity as often as any shall become due. This case falls almost in terms within that of *Colebrook v. Layton* (*a*), which is the last reported case. There the defeazance declared, that if the annuity should be in arrear twenty-one days, it should be lawful for the plaintiffs to sue out execution or executions upon the judgment, by one or more writ or writs of *fi. fa. de bonis ecclesiasticis*, or *de bonis propriis*, or both, or any other writ or writs whatsoever, or take or adopt such other proceedings as they should think fit, for the recovery of the arrears of the annuity. The defeazance referred to a bond which referred to an annuity deed directly charging the living. The Court held that the warrant of attorney was not bad, because it did not appear upon the warrant of attorney that the judgment was intended to operate as a *continuing charge*, for the purpose of securing the payment of sums to become due in future,—to which cases alone they considered that the statute of 13 *Eliz.* c. 20, applied. The judgments of *Littledale, J.*, *Taunton, J.*, and *Patteson, J.*, (the Chief Justice not having been in Court upon the hearing of that case,) and especially that of *Taunton, J.*, are directly and most strongly applicable to the present case. This warrant of attorney could not in any way operate as a *continuing charge on the benefice*. If the deed charges the benefice, *quoad hoc* it is void. This sequestration is, however, upon the warrant of attorney, which does not refer

(*a*) *Ante*, vol. i. 374; 4 *Barn. & Adol.* 578.

to the deed in such a manner as to embody it. The sequestration is in strict pursuance of the defeazance of the warrant of attorney, and is issued only for the arrears of the annuity; *Gibbons v. Hooper* (a), *Brittain v. Wait* (b), *Moore v. Ramsden* (c), *Johnson v. Brasier* (d).

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*Campbell, A. G. and Comyn, contra.* This warrant of attorney clearly operates *indirectly*, if not *directly*, as a charging of the benefice, contrary to the provisions of 13 *Eliz. c. 20*. The defeazance recites that a bond and an indenture of even date, had been given to secure the annuity, and that by the indenture Mr. *Hewett* had charged *the said annuity upon the rectory*, and that the warrant of attorney was agreed to be given as a collateral security. Here, therefore, it appears upon the face of the warrant of attorney itself, that it is given to secure an annuity *charged upon the living*, and this is sufficient to distinguish the case from *Colebrook v. Layton*. If the *annuity* appears to be charged upon the living, the warrant of attorney is void; *Flight v. Salter* (e), *Gibbons v. Hooper* (f), in which the Court supported the warrants of attorney and judgments and sequestrations, was decided upon the ground that "there was nothing in the defeazance to shew that they were intended to bind the living, more than in any other case, where a clergyman gives the same security;" that case therefore leaves *Flight v. Salter* untouched. In *Colebrook v. Layton* the Court expressly supported *Flight v. Salter*, and the distinction there taken between that case and *Flight v. Salter* makes it a strong authority in favour of the present defendant;—the distinction being, that in one the defeazance recited an indenture as *expressly charging* the annuity, and in the other that it did not. Here, not only does the defeazance recite that by an indenture the annuity

(a) 2 Barn. & Adol. 734.

(b) 3 Barn. & Adol. 915.

(c) *Ibid.* 917, note.

(d) *Ante*, 653.

(e) 1 Barn. & Adol. 673.

(f) 2 Barn. & Adol. 734.

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was charged on the living, but the whole of it is an elaborate expression of an *intention* to charge the living. In *Flight v. Salter* the execution might issue immediately, here it is not to issue until after some payment shall have been in arrear 21 days. [*Follett*. The defeazance in *Flight v. Salter* authorizes the plaintiff to *continue* the sequestration.] The legal effect is the same. *Newland v. Watkin* (a) is much stronger than the present case.

*Cur. adv. vult.*

In the second case, (*Skrine v. Hewett*), *Comyn*, in Easter term, obtained a rule nisi to set aside a warrant of attorney, judgment, and execution, as void under 13 *Eliz. c. 20*.

The defeazance (b) recited that Dr. *H.*, rector of Ewhurst and Rotherhithe, had agreed with *Skrine* for the sale of an annuity of 140*l.* for the life of *H.* for 1070*l.*, "to be secured by and made *chargeable upon, and to be issuing and payable* not only out of and from the rectory of E., and also the rectory of R., and the messuages, glebe lands, tithes, &c., and charged therewith by the indenture hereinafter mentioned," but also by the warrant of attorney of *H.*, and a judgment to be entered up at the suit of *Skrine* for 2140*l.* It was also recited that, in pursuance of this agreement, and in consideration of 1070*l.*, *H.* had, by indenture of even date, granted to *Skrine* an annuity of 140*l.*, to be charged and chargeable, &c., (ut *suprà*); and that by such indenture it was declared that *the judgment to be entered up*, in pursuance of the warrant of attorney, should be considered as a security for the payment of the annuity; and that in case of default of payment for 21 days, it should be lawful for

(a) 9 Bingh. 113; 2 Moore & Scott, 174.

(b) This defeazance, instead of being indorsed upon, or subjoined to, the warrant of attorney in the usual form, was embodied in the

warrant of attorney, and preceded the formal part of that instrument, by way of recital of the agreement upon which the authority to confess the judgment was given.

*Skrine* immediately to issue upon the judgment one or more writ or writs of fieri facias de bonis ecclesiasticis, to be directed to the bishop of the diocese, as also such other writs as *Skrine* should think fit to ground upon such writ or writs, and to indorse such writ or writs to levy 2140*l.*, being the sum for which such judgment should be entered up, together with all costs, in order that *Skrine* might sequester the glebe lands, tithes, &c. of the two rectories, and thereby be in full possession of the premises, upon trust, for better securing the annuity. And it was agreed that *no execution should be issued, unless the annuity*, or some part thereof, should be *in arrear* for 21 days, in which case it should be lawful for *Skrine* to *sue out execution* upon the judgment *for the recovery of the arrears*.

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*F. Pollock* and *Curwood* now shewed cause. A warrant of attorney, which itself professes to charge the benefice and provides that the judgment shall stand as a security for the annuity, the Court will set aside. But where it is in the common form, and is silent with respect to the annuity, and the object is to enter up judgment immediately, in order to keep off other creditors, the Court will permit the judgment to remain. The present is an intermediate case: the object is professed to be to secure the annuity; but the warrant of attorney is in the common form. The Court will say, as was said by Lord *Tenterden* in *Britten v. Wait*, "We cannot set aside the warrant of attorney, which *on the face of it* is free from objection." If the warrant of attorney has two objects expressed upon the face of it, one *legal* and the other *illegal*, there is no reason why the *legal* object should not be carried into effect. [Lord *Denman*, C.J. The statute says the *charging* shall be void.] It will be strange if a warrant of attorney is to be rendered unavailable merely because the object of giving it is expressly *stated*, and that it shall be held valid in cases where no one can doubt that the object was the same, although it is not *expressly* stated on the face

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of the warrant of attorney. In *Flight v. Salter*, the warrant was expressed to be given to the end and intent that a sequestration might be obtained or procured *and continued*. Here, there is no provision *for continuing* the execution; but, on the contrary, it is expressly stated to have been agreed that the execution should only issue in respect of the arrears.

*Campbell, A. G., and Comyn, contra.* By the defeazance it appears that the living is to be sequestered, and that the benefice is to be held *as a security for the payment of the arrears as they become due*. The execution is to issue for 2140*l.*, and not for the arrears which may have become due; and therefore was intended to operate as a *continuing* security. To prevent an execution from being issued, the Court should set aside the warrant of attorney. The argument which has been used, that the warrant of attorney has two objects, one legal and the other illegal, might have been urged in *Flight v. Salter*.

*Cur. adv. vult.*

On a subsequent day in this term, the judgment of the Court, in the former of the above cases (*Saltmarsh v. Hewett*), was delivered by Lord DENMAN, C.J., as follows:

This was a rule calling upon the plaintiff to shew cause why the warrant of attorney, judgment, and writ of sequestration, should not be set aside; and the question to be decided is, whether that warrant of attorney is void, as being contrary to the statute of 13 *Eliz. c. 20*. The warrant of attorney is to confess judgment in an action of debt for 3600*l.*, and the defeazance thereto, upon which the question turns, is in the following form. (His lordship here read the defeazance.) It is therefore expressly provided, that "in case the said annuity, or any part thereof, shall be in arrear for a certain time therein specified, *then and so often as it shall so happen*, it shall be lawful for *Saltmarsh, &c.* to sue out such execution or executions, upon the

judgment, as he or they shall think fit, and also to *sequester* the rectory of Rotherhithe, and all and singular any of the glebe lands, buildings, &c. thereto belonging;—so that, if we had been called upon now (for the first time) to put a construction upon the act of parliament, it seems hardly to admit of a doubt but that the rectory of Rotherhithe *is* charged with the payment of the annuity in the event of its being in arrear, or, in other words, that the said “benefice *is charged* with a profit out of the same to be yielded and taken.” Cases however have been brought under our notice, bearing (as they certainly do) upon the point in question. In support of the rule, reliance was placed upon the case of *Flight v. Salter* (a); and against it, upon the recent case of *Colebrook and others v. Layton* (b). In the former case the warrant of attorney *directly* referred to the annuity deed, and was declared to be “for the purpose of securing the said annuity, and to the end and intent that a sequestration might be obtained or procured, and continued by *Flight*, his executors &c., pursuant to the therein before recited indenture.” In the latter case it was averred, by *affidavit*, “that the warrant of attorney was given for the express purpose of charging the said vicarage and curacy with the payment of the annuity, and for the purpose of enabling the plaintiffs to sue out the before-mentioned executions.” Upon the discussion of *Colebrook and others v. Layton*, the authorities were brought under the consideration of the Court, and particularly the case of *Flight v. Salter*, upon which then, as now, reliance was placed, in support of the application to set aside the judgment entered up on the warrant of attorney. The Court, however, distinguished (and we think rightly) between the impeachment of the warrant of attorney, depending *upon affidavit*, and an objection which is presented to the notice of the Court *upon the face of the instrument itself*. And accord-

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(a) 1 Barn. &amp; Adol. 673.

(b) *Ante*, i. 374; 4 B. & Ad.  
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ingly, as the Court then thought (and we are now of opinion), that there was not sufficient relation or connexion between the warrant of attorney and the annuity deed to shew that the benefice was to be charged to pay the annuity, in the event of its being in arrear, the rule to set aside the judgment was discharged. In the present case, however, from the language of the defeazance, we are of opinion that enough appears to shew that the warrant of attorney was given "to charge the benefice," and is, therefore, void by the statute. In adopting this distinction, we think that we are not only deciding in conformity to the authorities and within the meaning of the statute, but are, possibly, laying down as intelligible a rule as can easily be suggested, for preventing the recurrence of those questions which have been so frequently raised, in a very short time, upon the construction of these instruments. It seems proper to add, that the authorities cited to us (with the exception of *Colebrook and others v. Layton*, which is of a more recent date), namely, *Shaw v. Pritchard (a)*, *Flight v. Salter (b)*, *Gibbons v. Hooper (c)*, and *Doe v. Carter (d)*, were brought under the consideration of the Court of Common Pleas, in *Newland v. Watkin (e)*.—There a rule had been obtained to set aside the plaintiff's warrant of attorney, judgment and sequestration.—The warrant of attorney is not set out, but the report states that it was given "to enter up judgment for the arrears of the annuity," and "expressly authorized him to issue sequestration." The Court, having taken time to consider, made the rule absolute, deciding that the plaintiff should no further enforce his writ of sequestration, but should not be subject to an action of trespass. The reasons of the Court are not given.

Upon the whole, we are of opinion that this security

(a) 5 Mann. & Ryl. 180; 10  
 Barn. & Cressw. 241.  
 (b) 1 Barn. & Adol. 673.  
 (c) 2 Barn. & Adol. 734.

(d) 8 T. R. 87, 300.  
 (e) 9 Bingh. 113; 2 Moore &  
 Scott, 174.

cannot be supported, and that the rule must be made absolute.

Rule absolute.

In *Skrine v. Hewett*, which was considered a stronger case for the defendant, the rule was made absolute as of course.

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### FERGUSON v. SPRANG.

**DEBT** on an indenture made between the defendant and the plaintiff, whereby the defendant, in consideration of 200*l.*, granted to the plaintiff, his executors &c., an annuity or clear yearly rent charge of 20*l.*, to be charged and chargeable upon certain messuages for the term of 60 years from the day of the date of the indenture, and to be payable on &c.; and covenanted with the plaintiff to pay the annuity. Averment: that 10*l.* of the annuity was in arrear and unpaid.

General demurrer to the declaration, and joinder.

*A'Beckett*, in support of the demurrer. The declaration is bad, because it sets out a contract, which, on the face of it, is usurious. In *Doe d. Grimes v. Gooch* (a), *Bayley, J.* said, "there is no case in which an annuity for years has been held not to be usurious, where, on calculation, it appeared that more than the principal with legal interest is to be received." *Ferreday v. Wightwick* (b) is in point. There, an annuity of 664*l.* 18*s.*, for a term of eleven years and a half, was purchased for 4000*l.* The

A deed by which A., in consideration of 200*l.*, grants to B. an annuity or rent charge of 20*l.* a-year for sixty years, is not on the face of it usurious. To raise the question of usury upon a declaration on such a deed, the defendant must plead an usurious contract and thereby raise an issue of fact for the jury. The declaration is good upon demurrer. When it is a matter of calculation (other than the very simplest,) whether a contract is usurious, the Court will The risk of the

(a) 3 Barn. & Alders. 666.

(b) 1 Russ. & Mylne, 50.

not look at it to see whether it is so; that is a question for the jury. The risk of the insolvency of the grantor of an annuity otherwise usurious, is not such a risk of the principal money as will operate to make such a grant valid.

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purchase deed contained a covenant to pay the annuity half-yearly.—The grantor gave to the grantee 23 promissory notes each for 33*2*l. 9*s.*, payable respectively at the times when the successive half-yearly instalments of the annuity would become due.—*Leach*, M. R. held that this transaction was plainly usurious, as it was in effect an agreement to repay the principal sum with interest, the amount of which would exceed the legal interest. Grants of annuities for lives, where more than the amount of the legal rate of interest is taken, were considered as exempt from the usury laws, on the ground that these transactions were *purchases*, not *loans*; *Fench's* case (a). In *Holland v. Pelham* (b), it was said by *Bayley*, B. “The statute of usury imposes a penalty where a party takes more than legal interest upon a *loan*.” What is meant by the word *loan*? It means that the principal is not in hazard, but is to be returned by the borrower. *Murray v. Harding* (c) shews, and it is now established, that the true criterion whether or not a grant of an annuity, the instalments of which would, if regularly paid, exceed the amount of principal and interest, is usurious, is, whether the principal is really put in hazard. Here, the principal is *not* put in hazard. In *Doe v. Gooch* it was left to the jury to say whether the transaction was a purchase or a loan, and they held it to be a loan and usurious. Here, the transaction on the face of the deed is usurious. The principal is *not* put in hazard, and certain sums are to be paid at stated times.

*Platt*, for the plaintiff. The purchase of an annuity, unless it be merely as a colour for obtaining more than five per cent. on a loan, is not usurious. Whether this is an usurious contract is a question for a jury and not for the Court. [Lord *Denman*, C. J. Is not this a *loan* on which more than five per cent. is reserved?] This is not a *loan*. The borrower may, if he pleases, repay the money (d); but the

(a) 1 Anders. 121, pl. 169.

(b) 1 Crompt. & Jervis, 575.

(c) 2 W. Bla. 859

(d) *Post*, 667 (a), 670 (a).

lender cannot *enforce* the payment. [Lord *Denman*, C. J. This view of this case distinguishes it from *Ferreday v. Wightwick*. The Master of the Rolls might think it necessary to decide as a *jury* would have done. *Taunton*, J. I always understood the principle to be, that there must be some *risk* of the principal. How is there any risk here? This is not an annuity for life, but for a certain number of years.] That principle has so far afforded a test, that where the principal is risked the contract is *not* usurious; but it has never been laid down *à converso*, that where the principal is *not* risked, the contract is *therefore* usurious. It is admitted that the principal is not in this case risked; but it may not be convenient or advantageous to receive back the principal in small sums. [*Littledale*, J. If this rent charge had been granted for twenty years only, it would have been good.] The grant being for sixty years makes it a matter of calculation whether more than five per cent. is taken. [Lord *Denman*, C. J. There is no clause for re-purchase here (*a*).] The Court cannot conclude upon the face of the record that more than 5*l.* per cent. interest has been taken. This is the purchase of a certain sum annually. It is upon the face of the declaration called an *annuity*. Usury is generally *pleaded*, which shews that whether or not a transaction is usurious, is a question for the jury. [*Taunton*, J. Usury is *usually* pleaded because the lender has generally the grace to put some disguise upon the transaction, so that it does not appear in all its naked deformity. Here, the lender has been 'too *candid*. Lord *Denman*, C. J. The only risk here is the uncertainty of not getting back the principal *in solido*.] The grantor may be insolvent before the lapse of five years. [*Taunton*, J. Is there any case in which the

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(*a*) The deed contained a clause giving an option to the defendant to re-purchase the annuity; but this clause was not set out in the declaration. To entitle the de-

fendant to avail himself of any objection accruing out of the existence of such a stipulation, it would have been necessary to set out the whole deed upon oyer.

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risk of the *insolvency* of the debtor has been held to make a transaction not *usurious* which would otherwise be so?] There is no such case. But a *plea* stating the facts mentioned in this declaration, without averring *in terms* that the contract was *usurious*, would be bad. How then can the transaction be *usurious* upon the face of the declaration? No facts will warrant the Court in declaring the transaction upon the face of it *usurious*, except where more than five per cent. as interest is *expressly* and *in terms* reserved. This transaction is bad if it be a contrivance to get more than legal interest;—but then it is a question for a jury whether or not it is a contrivance for that purpose.

The statute of *Ann.* prohibits the taking of more than five per cent. for the *forbearance* of 100*l.* How can money be said to be *forborne* which is *never to be returned*?

*A'Beckett*, in reply. The demurrer is in fact a *plea*; and is the proper course, where the objection is that the instrument, as set out in the declaration, is *on the face of it* *usurious*. Whether or not the parties *intended* to make an *usurious* contract can make no difference. In *Mark v. Martindale* (a), the grantor of an annuity (redeemable on payment of 3500*l.*.) having agreed with the grantee to redeem, the grantor drew a bill of exchange for 5000*l.* at three years, which the grantee discounted in the following manner: he took 4083*l.* 6*s.* 8*d.* the amount of the purchase money and arrears, advanced 166*l.* 13*s.* 4*d.* which he paid to the grantor in cash, and he took 750*l.* as the interest for three years on 5000*l.* Lord *Alvanley* said, “ Lord Chief Justice *Eyre* seems to have thought that the length of the date of the bill was sufficient to afford a presumption that the discount was intended as a cover for the loan. And if we consider the effect of discounting bills at very long dates, the strength of this presumption will be manifest; for if the practice be carried to a great

(a) 3 Bos. & Pull. 154.

length, the interest will annihilate the principal" (a). Surely if a *bill of exchange* would afford such a presumption, this transaction may clearly be taken to be usurious. In *Ferreday v. Wightwick*, it was sworn that the transaction was not a loan, yet the Master of the Rolls held that the transaction was tainted with usury. In that case the *security* failed; it might therefore have been contended that the principal was put in hazard by the risk of the *insolvency* of the debtor.

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LORD DENMAN, C. J.—The question in this case is, whether it ought not to have been *pleaded* that this was an usurious contract. To that point the judgment of *Leach, M. R.* in *Ferreday v. Wightwick*, is no authority. The Master of the Rolls may have acted in the capacity of a Court and of a jury also. If the nature of the transaction is equivocal, *we* cannot, sitting as a court of law, determine that the transaction is usurious. It appears to me that this deed is not on the face of it *necessarily* void. Whether or not it is a cloak for usury depends upon whether the money to be paid will exceed 5*l.* per cent. upon the sum advanced, and it is too much for *the Court* to take upon itself that inquiry, and to say that the transaction is at all events usurious. It is a matter of *calculation*, and depends upon the nature of the transaction and the intention of the parties. If the jury should find that this is a cloak for usury, then this is a bad contract. If, on the other hand, they should find that the transaction was *bonâ fide* and not usurious, then the contract is not void.

LITLEDALE, J.—I do not know to what conclusion a *jury* might come to upon this deed;—but upon the *face of the declaration* it does not sufficiently appear that this was an usurious contract. It is quite clear that the plaintiff is entitled to something more than five per cent., for it does not appear that the principal is as such to be repaid. We cannot sit down and calculate or take judicial notice that

(a) 3 Bos. & Pull. 154.

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more than five per cent., together with the principal, will be repaid to the lender.—Therefore we cannot determine that more than five per cent. interest is taken.

TAUNTON, J.—The impression on my mind is just the reverse of what it was at the commencement of the argument, and I have been induced to change my opinion by the suggestions of my brother *Littledale*. This is a case in which the principal is gone absolutely and the purchase money is lost. It is, therefore, clear beyond all doubt that the purchaser is *entitled* to receive more than at the rate of five per cent. per annum on the purchase money. It is difficult for us to say by how much this reservation of 20*l.* a year for sixty years will exceed the amount of the principal and interest at five per cent. *We* cannot compute it. It is too difficult a question for the Court to take judicial notice of. If this was a question whether ten was more than five, or that two and two made four, the Court would take judicial notice of it. Here, the question depends on a difficult calculation, and ought therefore to be inquired into by a jury.

WILLIAMS, J. concurred.

Judgment for the plaintiff (a).

*A'Beckett* applied for leave to amend, which the Court refused.

(a) The law of France recognizes no annuities except in perpetuity (*rentes perpetuelles*) or for life (*rentes viagères*.) Code Civil, 1909, 1914. The former *must* be redeemable. An engagement to pay an annuity for a term of years would probably be considered

merely as a contract to pay a sum in gross by instalments.

As to the question how far *perpetual* annuities are distinguished from contracts for the payment of usury or interest, *vide* Pothier, *Traité du Contrat de Constitution de Rente*, No. 5.



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**TRESPASS**, for breaking and entering A. and five other closes of the plaintiff at Rickmansworth, Hertfordshire, and hunting, searching for, and killing game therein; and seizing and carrying away the same and converting it to his own use. The declaration contained a count charging a trespass in a certain other close, giving the abutments; and a third count upon an asportation of dead game.

Plea, to the first count (after averring that the unnamed closes mentioned in the first count were closes called B., C., D. and F.) that *Charles 1* was seised in fee of the closes in which &c., and being so seised, by letters patent dated 5th July, 1628, granted to *William Earl of Pembroke*, and two others, and the heirs and assigns of the earl, that they and the heirs of the earl might have, hold, and enjoy on the said several closes, free warren, fowling, and hunting. The plea then stated the seisin of *Lord Pembroke* of the said free warren by virtue of the said grant, and deduced a title to such free warren down to the year 1818, when it alleged a devise of the said free warren by *H. F. Whitfeld* to *John Forster* and *Thomas Deacon*, by virtue whereof they became seised of the free warren, and that they on the 16th June, 1818, by bargain and sale for a year, granted the free warren in and over the said closes in which &c., to *R. Williams*, *W. W.*, and *T. L.*, and by an indenture of release dated 17th June, 1818, released the same to them and their heirs. The plea then deduced the title to the free warren from *R. W.*, *W. W.*, and *T. L.*, to the defendant, who in exercise of his right of free warren, justified his committing the trespasses complained of.

The second plea differed from the first in treating the different mesne conveyances as *grants* of the free warren.

as appurtenant to the manor or lordship, or any part thereof (a).

Whether upon a traverse of a grant by *deed* alleged to have been made by a subject seised in fee under a *derivative* title, which is set out and is not traversed, *the title of the grantor* can be questioned, as in the case of the king granting by matter of *record* out of an alleged *original* seisin, *quære*.

(a) The first and fourth clauses are alone inserted here, the second and third not having been in the judgment. *Vide post*, 673 (b).

Free warren cannot be *parcel* of a manor, and therefore will not pass by a grant of *the manor*, without the *appurtenances*, though it be held with the manor.

A warren can *appertain* to a manor only by *prescription*.

Free warren *in gross*, of which a grantor is seised, will not pass by a grant of a manor and the appurtenances.

Nor by a grant of a manor and all right of fishing, fowling, hawking, hunting and shooting, royalties, franchises, hereditaments and appurtenances belonging to or in any wise appertaining to the manor, or such as were in and by the deed of grant or letters patent granted and assured by the crown



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To the first and second pleas, the plaintiff, after taking by protestation the seisin of *Charles 1*, of the closes in which &c., replied by traversing the alleged *release* and *grant* by *John Forster* and *Thomas Deacon*; (that is to say) the plaintiff alleged that the said *Forster* and *Deacon* did not by the said indenture *release to the said R. W., W. W., and T. L., the said free warren in and over the said closes in which &c., in manner and form as in the first plea is alleged. And that they did not, by the said indenture in the said second plea in that behalf mentioned, grant unto the said R. W., W. W., and T. L., the said free warren in and over the said closes in which &c., in manner and form as in the said second plea is alleged*; and upon these traverses issue was joined. At the trial, the defendant, to support his case on the first and second issues, proved the execution of a conveyance by lease and release of 16th and 17th *June*, 1818, by which *Forster* and *Deacon* released to *R. W., W. W., and T. L.*, their heirs and assigns, the manor or lordship, or reputed manor or lordship of *Rickmansworth*, and right of fishing, *fowling, hawking, hunting, and shooting*, ways, waters &c., profits, *royalties*, courts leet &c., and all other rights, liberties, *franchises*, jurisdictions, privileges, profits, commodities, advantages, *hereditaments* and appurtenances whatsoever to the said manor or lordship *belonging*, or in anywise *appertaining*,—or (secondly) to or with the same or any part thereof, then or at any time theretofore usually had, held, used, occupied, or enjoyed,—or (thirdly) accepted, reputed, deemed, taken or known as part, parcel, or member thereof,—or (fourthly) as were in and by the said deed of grant, or letters-patent, granted and assured by the crown to the said *William Earl of Pembroke* and his heirs, as *appurtenant* to the said manor or lordship, or any part thereof.

The defendant then also gave in evidence the letters-patent from *Charles 1* to the Earl of *Pembroke*, by which the king granted to the earl and the two others, and the heirs and assigns of the earl, that they and the heirs and assigns of the earl might have *free chase and free warren* in

all the *demesne lands*, and the *lands holden by copy of court roll* of the manor of Rickmansworth (*a*), and in other the *demesne lands* and the *lands holden by copy of court roll* of the manor of Moor aforesaid; and in all woods and tenements then being or which thereafter should happen to be within or upon the said land; and all that which to free chase and free warren did belong.

The defendant also gave in evidence a survey (*b*) of the manor of Rickmansworth, made by the king's surveyors, and a jury of twenty-five tenants of the manor in the third year of the reign of *James I*, by which, after setting out the names and quantities of the free and customary tenants and tenements, and the boundaries of the manor, the jurors found that the *free fishing, fowling, and hunting, throughout the whole manor, belonged to the king as lord of the manor*.

The defendant also gave in evidence the court rolls, by which it appeared that the five closes unnamed in the first count of the declaration, but named in the first and second pleas, were *copyhold* of the said manor.

The defendant also proved that former gamekeepers had sported over the manor.

The plaintiff, after this evidence, made certain objections to the title of *Forster* and *Deacon*, and further contended, that supposing the free warren, claimed in and relied upon by the first and second pleas, to have vested in *Forster* and *Deacon*, it was a free warren *in gross*, and did not pass by the release of 17th June, 1818.

The defendant contended that all the objections taken were invalid, and further, that the plaintiff had merely taken

(*a*) Part only of the letters-patent are here set out. By the former part the king had granted the manor itself.

(*b*) This piece of evidence was probably introduced for the purpose of satisfying the second or third branch of the clause by which *F.* and *D.* conveyed to *R. W.*, *W. W.*, and *T. L.* The

opinion of the court upon the effect of this evidence does not appear, except so far as it may be *inferred* from their not giving the defendant that judgment to which he would have been entitled, supposing him to have brought himself, by such evidence, within either the second or the third branch of the conveying clause.

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a traverse upon one particular conveyance in the defendant's deductions of title, and was therefore estopped by the form of the issues taken on the first and second pleas from raising the whole or any part of the objections, if in other respects such objections were valid. These points were reserved by the learned judge, under whose direction the jury found a verdict for the plaintiff upon all the issues except the first and second; and upon these *pro formâ* for the defendant.

*Channell*, for the plaintiff. First, the plaintiff is not estopped by his replication from raising objections to the title of the supposed relessor in the first plea, and the supposed grantor in the second plea. The replication puts in issue the construction and efficacy of the deed, and therefore it puts in issue the title of the person making the deed, for if he had not the free warren he could not grant it; *Taylor v. Needham* (a), judgment of Sir *James Mansfield*, C. J. (b); *Eden's* case (c), where it was held that the effect of an issue of *non concessit* raised by a replication to a plea that the queen was seised in right of the crown, and by letters patent *concessit*, was, that the queen *had nothing* in the land. [*Taunton*, J. The plea states a devise to *Forster* and *Deacon*, by virtue whereof they became seised of the said free warren, and granted. Then the replication says that they *did not grant*. Does not this issue leave the seisin untraversed? Do not the words "by virtue whereof &c." narrow the issue to the mere *fact* of the grant?] *Non concessit*, it would seem, puts in issue the *title* of the grantor. In *Eden's* case it was said that the crown was *seised*, and that appears to be a parallel case. *Hynde's* case (d) confirms *Eden's* case. It must be admitted that the difficulty thrown out by Mr. Justice *Taunton* is a serious one, and that there is a case against the plaintiff, to which it will be necessary to advert. There are, however, other cases, in addition to those already cited, which shew

(a) 2 Taunt. 278.

(b) *Ib.* 282, *post*, 677 (a).

(c) 6 Co. Rep. 15 b.

(d) 4 Co. Rep. 70 b.

that by a traverse of one fact, other facts which might themselves have been the subject of special traverses, may be put in issue, *Dunstan v. Tresider* (a). [*Littledule, J.* That case is very different from the present. The plaintiff might well give evidence to shew that the house was newly erected, and not upon the site of an ancient house; for there cannot be an immemorial custom, unless there be an immemorial subject of such custom. *Taunton, J.* Is not the real and the simple question this—whether the effect of the grant and release was to *pass* the free warren?—whether that was included in the subject-matter of the demise? If that is decided for you, it is enough.]

II. It appears both upon the face of the pleadings themselves, and also by the charter of *Charles 1*, if reference be made to it, that the right of free warren, if *any* such was granted, was *in gross* and *not appurtenant* to the manor. In the plea it is stated that *Charles 1*, being seised of the *closes* in which &c., granted to Lord *Pembroke*, and two others, and the heirs and assigns of Lord *Pembroke*, that they should have, hold, and enjoy *on the several closes* free warren, fowling, and hunting; from which it certainly does not appear that the free warren was in any way connected with the manor of Rickmansworth. The charter of *Charles 1*, if referred to, will be found clearly to grant the right of free warren *in gross*, and not as appurtenant to the manor.

The conveyance which is traversed in the replication does not operate to pass a right of free warren *in gross*. That deed grants the “right of fishing, fowling, hawking, hunting and shooting,” and “royalties, courts leet, &c., and *all other* rights, liberties, franchises, jurisdictions, privileges, profits, commodities, advantages, hereditaments, and appurtenances whatsoever to the said manor or lordship &c. belonging, or in anywise *appertaining*, or to or *with the same* or at any time theretofore *usually held, used, occupied, and enjoyed*, or accepted, reputed, deemed, taken, or known, as *part*,

(a) 5 T. R. 2.

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*parcel*, or *member* thereof, or as were in and by the said deed of grant or letters-patent granted and assured by the crown to *William Earl of Pembroke*, and his heirs, as *appurtenant* to the said manor or lordship." Supposing that the words "right of fishing, fowling, &c.," or that the word "royalty," without more, would have been sufficient to pass the free warren in gross, yet they cannot have this operation here, for they are controlled by the latter words of the grant, which clearly confine the grant to the manor and *things appurtenant to it*, and forming a *part of the manor* itself. The authorities are clear to show that a right of free warren *in gross* will not pass by a grant of a manor and the appurtenances, however long such free warren may have been used and enjoyed with the manor; but that when it is parcel of the manor, it passes as incident to it; 35 *Hen.* 6, fo. 55; 8 *Hen.* 7, fo. 4, *Bro. Abr.* Warren, pl. 7; 22 *Vin. Abr.* Warren, f. 3; *Bowlston v. Hardy* (a).

*Harrison*, contra. Upon the question of the estoppel *Cowlshaw v. Cheslyn* (b) is precisely in point. That was an action of *quare clausum fregit*; the defendant pleaded that A. was seised in fee, and, being so seised, granted a right of way by lost deed. The plaintiff replied, traversing the grant. It was held that though the plaintiff might have taken issue on the seisin, yet that he could not, under the issue taken, give evidence to shew that A. was not seised. There are many old authorities which shew that where there is a long deduction of title, and the opposite party traverses one deed or one descent, &c., he admits the remainder; *Com. Dig.* (G. 10.); *Hudson v. Jones* (c), where it is said that "whatever is traversable and not traversed is admitted." In *Selby v. Bardons* (d), *Parke, J.*, when distinguishing the plea of *de injuriâ* from other pleas in bar, says "It is true that the general rule is, that when any pleading comprises several traversable facts, the whole ought not to be

(a) *Cro. Eliz.* 547.(c) 1 *Salk.* 90.(b) 1 *Crompt. & Jervis*, 48.(d) 3 *Barn. & Adol.* 2.

denied together, but one point alone disputed; and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation." There was a difference of opinion in that case among the judges as to whether the plea of *de injuriâ* was a good plea in bar, but the whole Court was agreed as to the general rule. As to *Taylor v. Needham*, which has been cited to shew that the plea of non concessit puts in issue the title of the grantor, it is to be observed that the dictum of *Mansfield*, C. J., was unnecessary to that case,—no authority is cited,—and it appears not to be supported by previous authority (*a*). With respect to the cases from *Coke's Reports* (*b*), they are very distinguishable from this case. In *Eden's* case the replication of non concessit to a plea that the queen was seised and by letters patent granted, necessarily put in issue the queen's title, for the letters-patent being matter of record, it could not be denied that the queen granted, except by shewing that she had it not to grant. This observation applies to *Hynde's* case, which has been cited as confirming the authority of *Eden's* case. It is contended that by traversing the grant by *Deacon* and *Forster*, their right to grant is put in issue; if so, every previous allegation is put in issue, and the best mode of replying to a plea stating a long deduction of title, will be, simply to traverse the last deed. This would be to make a plea or replication of non concessit as extensive as the replication de injuriâ. In *Dunstan v. Tresider* (*c*), the antiquity of the messuage was a part of the issue. It is no part of these issues whether the prior deeds are good or not.

II. The deed of 1818 is, upon a fair construction of it, sufficient to pass a right of free warren in gross,—supposing the free warren granted by *Charles 1* to be in gross. In

(*a*) In *Taylor v. Needham* the declaration began with a quod cum dimisisset. It contained no allegation of title in the lessor except that implied in the act of demising. Non dimisit therefore would put that title in issue, Co.

Lit. 47 b; *Dyer*, 122 b. pl. 23; P. 12 E. 4, fo. 4, pl. 9. And see H. 18 E. 3, fo. 28, pl. 27; T. 13 H. 7, fo. 24, pl. 1; *ante*, 652.

(*b*) *Ante*, 673.

(*c*) *Ante*, 674.

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construing deeds, the Court will now look more to the intention of the parties than to the old authorities which have been cited. The Court will effectuate the *intention* of the parties if they can, and keep in view the ordinary principle, that a deed shall be construed rather *against the grantor*. It is conceded that if the free warren is appendant it will pass by the deed, even without the words *cum pertinentiis*. [Littledale, J. I do not think it will pass without those words. *Dyer*, 30 a, is to the contrary. It is there said,—“There are three coparceners of a manor, and the king grants to them the right to hold a court leet (un law-day), and they make feoffment of the manor, nevertheless *they* shall have the court (law-day). The law is the same where I have a manor, and the king grants to me warren within the same manor; if I afterwards infeoff the king of the manor without pertinentiis, I shall have the warren.”] It is doubtful whether that authority is applicable to general cases, but, however, here the word “appurtenant” is used. *Shepard’s Touchstone*, 92, and the authorities there cited, seem to go to this extent,—that where a manor is granted *cum pertinentiis*, not only things appendant or appurtenant will pass, but also things which have acquired the *reputation* of being such. *Bowlston v. Hardy* (a) would be difficult to be got over if this deed had not been peculiarly worded. The words “fishing, fowling, &c.,” or “royalties,” or “franchises,” “belonging or in any wise appertaining, &c.,” it must be admitted, would not alone be sufficient to pass free warren in gross; but taken together with the words “or as were in and by the said deed of grant or letters-patent granted,” they are sufficient to pass this warren. [Taunton, J. Those words are controlled (b) by the words following them, “as appurtenant to the said manor or lordship, or any part thereof.”] The Court will not construe the deed with extreme rigour, because they will look somewhat at the *intention* of the parties. It cannot be supposed that the lord or any of the parties to the deed knew whether it was appendant or in gross. The words “usually held, used, occupied, or en-

(a) Cro. Eliz. 547.

(b) *Vide tamen, ante*, 672.

joyed, or *accepted, reputed, deemed*, taken, or known as part, parcel, or member thereof," may pass this right of warren, although it be not strictly appendant. They shew that it was intended by the parties to pass *whatever was in the lord* and was supposed to be appendant, although the precise words which in strictness the law requires are not used. In *Com. Dig. Fait*, (E. 4,) it is said that "a *nominal manor* will pass under the general words, "messuages, lands, tenements and hereditaments." Here the word "hereditaments" occurs, *Norris v. Le Neve* (a). All the older cases are cases of *feoffment*. This is by *lease and release*. Where the conveyance was by *feoffment* the livery of *seisin* was the real evidence of the conveyance. If upon the whole of this deed the Court collect that the party intended to grant the free warren, as if upon evidence of witnesses to the livery of *seisin*, they will say that it passed.

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*Channell* in reply. In *Cowlshaw v. Cheslyn* (b), the authorities were not before the Court. That case, it must be admitted, is opposed to *Eden's* case, but *this case* does not seem to be at all distinguishable from *Eden's* case. *Taylor v. Needham* (c) was not intended to be cited as a direct authority, but rather as stating plainly the argument for the plaintiff, which it was intended to support by authorities. In *Carr v. Smith* (d) it is evident that the Court allowed the *title* of the grantor to be gone into under a traverse of the grant of certain *vaccaries* and free warren. That case, and *Pickering v. Noyes* (e), seem to shew a distinction between a case in which the grant of a *free warren, royalty &c.* is traversed, and grants of an ordinary nature. [Lord Denman, C. J. Mr. Harrison must have an opportunity of observing upon those cases; we will not shut you out.]

(a) 3 Atk. 82.

(b) *Suprà*, 676.

(c) *Suprà*, 677 (a).

(d) Referred to by *Bayley*, B.

in the course of the argument in  
*The Attorney-General v. Parsons*,  
 2 Crompton & Jervis, 294.

(e) 4 Barn. & Cress. 639.



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II. It is clear that the right of warren is *in gross*, and therefore it does not pass by this deed. The title to the warren is deduced in the pleadings distinctly from the manor. It is not necessary to contend that there are no words in this deed which, taken alone, would be sufficient to pass free warren in gross, for whatever may be the effect which the words "royalty," and the other expressions which have been relied on, would otherwise have, it is controlled by the words following, which limit the operation of the grant to things appurtenant. It is said that the Court will look at the intention of the parties,—but there is no evidence of intention apparent upon the deed; and besides, in construing deeds as to *questions of free warren*, the Courts use particular vigilance, and require the right to be *strictly* shewn.

*Harrison* in observation upon the two cases cited by *Channell* in his reply. *Carr v. Smith* is, like *Eden's* case, an exception from the general rule. In *Pickering v. Noyes* the issue was, whether the party entered to *exercise a right* of free warren; which necessarily involved the question of the right.

LORD DENMAN, C. J.—The defendant justifies the coming on the plaintiff's close by reason of a grant of free warren, which came to him by a title which he deduces. It appears that this free warren is in gross, and the question is, whether this passed by the grant. *Bowlston v. Hardy* (a) is precisely in point. In that case the defendant pleaded that the plaintiff's land was late parcel of the manor of *D.*, and that Queen *Mary* being seised of the manor granted it to Sir *W. Peto*, and granted to him to have warren in the said manor, and that Sir *W. Peto* bargained and sold to the defendant the manor, and all warrens &c. thereto appertaining, or accepted and reputed as part of the manor: whereby he justified. To this

(a) Cro. Eliz. 547.

plea the plaintiff demurred. And all the justices, *without argument*, resolved that the plea was bad, for that the defendant had shewn a *warren in gross* in the patentee, which was not conveyed unto him by the bargain and sale; for a warren is not *parcel* nor any *member* of a manor, but it may be *appertaining*, but that is by prescription. That case shews that the free warren granted by the charter of *Charles 1* was free warren *in gross*, and that the grant by *Forster* and *Deacon* is not sufficient to pass such a right of free warren. It also decides the point made by Mr. *Harrison*, as to whether a free warren appertaining to the manor will pass by a grant of a manor without the word "*appurtenances*."

*Eden's* case seems to be a clear authority to shew that the statement of seisin in the grantor, whose grant is traversed, does not preclude the party traversing from shewing that the grantor had nothing to grant. Certainly the case of *Cowlshaw v. Cheslyn* is at variance with, but I do not think that it is a sufficiently direct and pointed authority to countervail, *Eden's* case. The plaintiff is therefore, I think, entitled to our judgment.

LITLEDALE, J.—I also think that the plaintiff is entitled to our judgment. The defendant justifies under a right of free warren over the locus in quo. He pleads that *Charles 1* was seised in fee of the closes in which the trespasses were committed; and being so seised by letters patent granted to Lord *Pembroke* in fee, to have free warren, fowling, and hunting, over those closes; and then it goes on to deduce a title down to the defendant. The plaintiffs take issue on the grant to *Forster* and *Deacon*, which they deny. There are three kinds of free warren—appendant, appurtenant, and in gross. The defendant in his plea has stated this free warren to be in gross, for they have not stated it to be appendant or appurtenant to any manor. The whole allegation is, that *Charles 1* granted free warren over certain closes of which he was seised,

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and which are the loci in quibus. Then in support of the issue—whether *Forster* and *Deacon* granted, the defendant gives in evidence the letters-patent, which are in these words: (his lordship here read from the special case, the part of the letters-patent there set out.) Taking the grant alone as it stands here, it certainly gives only a free warren *in gross*. I take it for granted that there was also a grant of the manor. It appears that the king was at that time lord of the manor. If in the same deed he had granted the manor and the warren, and it had appeared that the warren was appurtenant, there would have been a different question. But here the instrument given in evidence appears to comprise only the warren, and it may be that the manor was granted by a different deed. This deed grants a right of free warren over all the demesne and copyhold lands, which certainly is a warren *in gross*. There being then free warren *in gross*, the next question is, whether that passed, by the indentures of lease and release, from *Forster* and *Deacon* to the parties under whom the defendant claims. In my opinion those indentures do *not* pass the free warren, because the free warren was distinct from the manor.

With regard to the other point, it is not material to consider it, because we decide that the grant itself, which is traversed, does not pass the free warren, supposing that *Forster* and *Deacon* were seised.

TAUNTON, J.—It is not necessary to decide upon more than one of the questions raised. This lies within a very narrow compass, and is by no means difficult of solution. It appears upon the plea, that *Charles* 1, being seised of the closes in question, and also of the manor, made a grant to Lord *Pembroke* and his heirs and assigns, of free warren over the closes in question. The plea then deduces a derivative title down to *Forster* and *Deacon*, who are stated to have been seised. It then states that they bargained and sold the said free warren to *Williams* and

others, and released to the same persons. It then further deduces title down to the defendant. The second plea states that *Forster and Deacon granted*. To the first plea the plaintiff replies, that *Forster and Deacon* did not release; and to the second, that they did not grant the free warren. Whether or not by the grant or release stated in the pleas, the right of free warren granted to the Earl of *Pembroke* passed, is the only question. I am clearly of opinion that it did *not*. The grant of free warren is in gross. It does not appear that it was in any way either appendant or appurtenant to the manor of which the king was seised. The grant is, that Lord *Pembroke*, and his heirs and assigns, may have free warren and free chase in all the demesne lands, and the lands holden by copy of court roll of the said manor," which is nothing more than a grant of free chase and free warren *in gross*. The conveyance by *Forster and Deacon* is nothing more than a conveyance of the manor, and all things belonging to it,—with all its *incidents*. With respect to the *intention* of the parties, it does not appear that there was any intent to convey *free warren*. The only intent seems to me to be to convey the *manor* and all its *incidents*. There is an enumeration of the various incidents, such as is to be found in almost every conveyance of a manor, and yet there is not even the word "warren" used, which often occurs when there is no pretence for saying that there is any warren belonging to the manor. After an enumeration of the various incidents, it concludes "to the said manor or lordship belonging, or in anywise *appertaining*,—or at any time theretofore usually held, used, occupied and enjoyed,—or accepted, reputed, deemed, taken or known as *part, parcel or member thereof*, or as were *in and by the said deed of grant or letters patent*, granted and assured by the crown to the Earl of *Pembroke* and his heirs, *as appurtenant to the said manor or lordship*." This warren does not *appertain* or belong to the manor, nor was it granted and assured by the

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crown *as* appurtenant to the manor (a). Therefore this deed cannot comprehend the free warren. I think the free warren neither did nor was intended to pass. Our decision receives ample confirmation from the case of *Bowlston v. Hardy* (b). The law upon these questions of free warren was much more frequently discussed, and probably much better understood in the reign of Queen *Elizabeth* than now. That case of *Bowlston v. Hardy* decides not only that a free warren in gross will not pass by the grant of a manor and of a warren *appurtenant* to the manor, but also that a warren is in *no* case *parcel* of a manor, though it may be *appertaining* by *prescription*. Here, there is no pretence for saying that there is a prescription. The grant of *Charles* 1 contains nothing to shew that the free warren was *annexed* to the manor. The defendant, therefore, cannot make out his right claimed by the first and second plea.

The decision upon this point renders it unnecessary to go into the other point.

WILLIAMS, J.—If it had been necessary to decide whether, when a distinct issue is taken upon one deed in a deduction of title, you may travel back, and go into other parts of the title, I should have wished for time to consider. It is, however, wholly unnecessary to say how much is put in issue by this distinct allegation. I shall content myself with saying, that the deed of 1818 purports only to be a conveyance of a manor with the *usual* accompaniments and appurtenances of a manor, and this not including the warren, I am of opinion that the defendant's allegation is not made out.

Judgment for the plaintiff.

(a) *Ante*. 671, (a).

(b) *Ante*, 678.

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## The KING v. The JUSTICES of the City of YORK.

**CRESSWELL** had obtained a rule nisi for a mandamus to the justices for the city of York, to settle and allow certain costs and expenses incurred by *Matthew Gawthorpe*, in and about an inquest lately held for assessing the damages to be given to *Gawthorpe*, for a certain messuage and hereditaments required to be taken for the purposes of 3 & 4 Will. 4, c. lxii., for (inter alia) improving and enlarging the market places within the city of York. From the affidavits upon which the motion was made, it appeared that the trustees under this act had required, for the purposes of the act, a house belonging to *Gawthorpe*, (and which was in the first schedule to the act,) and had offered him 680*l.*, which *Gawthorpe* refused. Upon this, a jury was summoned under section 28 (a), who assessed the value of the premises at 720*l.* *Gawthorpe* afterwards, under section 31 (b), applied to the clerk of the trustees


A company for effecting improvements in a town, is empowered by statute to take certain lands &c. upon giving notice and making compensation—the amount of which compensation, if not agreed upon, is to be ascertained by a jury—and it is provided that in case the jury shall assess the damages at more than was offered, the company shall pay “the costs of the notices and precepts, and of summoning the jury and witnesses, and also of the inquest.”—

Held, that a party whose property was assessed at more than the sum offered, was entitled to his general costs attending the trial, but not to the expenses of surveying.

(a) By which it was enacted,—that if any bodies politic or corporate &c., or any other person or persons whatsoever, proprietors or owners of, or interested in, any messuages, buildings, &c. mentioned in the first schedule, or any occupier or occupiers of any messuages &c. sustaining any loss &c., should for the space of ten days next after notice in writing from the trustees should have been given to him or them, purporting that such messuages &c., were required for the purposes of that act, neglect or refuse to treat and agree, or should not agree for the sale thereof, or by reason of absence or disability should be prevented from treating and agreeing, or could not be found or known, or should not produce a clear title, the trustees should cause the value

or recompense to be made for such messuages &c., to be ascertained by a jury of twelve indifferent men of the city or county of York. The section authorized the trustees to issue their warrant to the sheriff to summon a jury, who was to summon accordingly, and to swear twelve men, and the sheriff was empowered to summon, swear and examine witnesses. The jury were to assess the value of the property and give their verdict accordingly; and after the jury had given their verdict the sheriff was to order and adjudge that the same should be paid for the premises according to such verdict or inquisition of the jury.

(b) By which it was enacted,—that in case any jury summoned to assess the value of any premises, should give a verdict or assessment

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to pay him the amount of his attorney's bill of costs incurred upon and by reason of the inquest,—which being refused, he, on the 13th May, 1834, attended before the magistrates of York for the purpose of having the bill settled and allowed. The clerk to the trustees attended also on the part of the trustees, and denied the right or power of the justices to allow any of the costs or expenses contained in the bill. The justices, upon hearing this objection, refused to settle or allow the bill of costs and expenses, or any part of it. The items in the bill were for the attorney's own attendances, and for preparing brief &c.,

for more money, as a satisfaction for the right, interest or property of any person, body politic &c. in or to such messuages &c., or for any such damage or injury as aforesaid than should have been offered by the trustees before the summoning or returning of the jury and witnesses, then the costs and expenses of the notices, precepts, and of summoning and returning the jury and witnesses, and *also of the said inquest*, (such costs and expenses to be settled and allowed by a justice of the peace for the said city,) should be borne and paid by the trustees out of the money arising by virtue of that act, and should and might be recovered by the persons entitled thereto, by distress and sale of the goods and chattels of the trustees or their treasurer, (unless such treasurer should pay such costs and expenses) under a warrant to be issued for that purpose by any justice of the peace for the said city, which warrant any justice is thereby authorized and required to issue under his hand and seal, on application made to him for that pur-

pose by the party entitled or claiming to receive such costs and expenses. But if any such jury should deliver a verdict or assignment for no more, or for less money than should have been offered as aforesaid by the trustees before the summoning or returning of the jury, then one moiety of the costs and expenses aforesaid should be borne and paid by the person or persons, body politic &c., with whom the said trustees shall have had any controversy and dispute, and should be recovered in the same manner as any penalties or forfeitures as thereafter directed to be recovered, and the other moiety should be paid by the trustees out of the money arising as aforesaid, and to be recovered by distress and sale in manner aforesaid; but in cases where parties, by reason of absence or disability, should have been prevented from treating or agreeing, such costs should be paid and borne by the trustees out of the money arising by virtue of that act, and be recovered by distress and sale as aforesaid.

and for the costs of the surveyors and other witnesses at the inquest.


From the affidavits in answer, it appeared that the trustees had immediately after the inquest paid to the under-sheriff the costs of *holding the inquest*, viz. for precepts and summonses, and fees to bailiffs, under-sheriff, and jury-men, and incidental expenses of holding the inquest.

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Sir J. Scarlett and Alexander now showed cause. The whole question turns upon the meaning of the words in the 31st section "costs of the said inquest." The trustees contend that this expression includes only the costs of *holding* the inquest, and the applicant contends that it embraces the *ex-parte* costs of the successful party. If the legislature had intended that the trustees should pay to the party recovering more than had been offered to them, the expenses of surveyors and of witnesses, attorneys and counsel, they would have used very different language, such as "all the costs and expenses attending the inquiry." But in this clause certain costs are *specified*, so as to exclude other costs which are not particularly named. The words used are "costs and expenses of the notices, precepts, and of summoning and returning the jury and witnesses, and also of the inquest." If by "costs of the inquest" the legislature had meant to include all the costs attending or connected with such inquest, they would not have specified the costs of *precepts*, and of summoning the jury and witnesses. Expressio unius exclusio est alterius. The costs of the inquest, properly speaking, are the sheriff's fees and the expenses of the jury. [*Littledale, J.* The statute of Gloucester (*a*) says only that the demandant may recover against the tenant the costs of his *writ*, yet, as you are well aware, that has been held to extend to all the costs of the suit. I only make this observation to show that words in an act giving costs to the successful party, will have an *extensive* meaning put upon them.] At the time when the

(a) 6 Edw. 1, c. 1, s. 2.



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statute of Gloucester was passed, acts of parliament were very short, and "costs of the writ" might well be held to mean all the costs of the suit,—but now the legislative style is particularly redundant. Besides which, if in the statute of Gloucester, some other *specific costs of suit* had been mentioned in addition to *costs of the writ*, the Courts would probably not have extended the meaning of "costs of the writ." In *Cone v. Bowles* (a) it was held, that "all statutes that give costs must be construed *strictly*," for that costs are in the nature of a penalty. As such they are expressly treated in the 30th section of this act. *Rex v. Glastonbury* (b) also shows that the Court will not give costs unless the title to them be clearly established.

Several strong arguments, favouring the construction which the trustees put upon these words, are to be drawn from other parts of the same section. When the jury assess the damages at *less* than was offered by the trustees, *each* party is to pay a moiety of the costs, not *his own* costs, but a *moiety* of the costs *generally*. If by costs, is meant the costs to be paid to the under-sheriff for the expenses of holding the inquest, the provision is intelligible; but if it means all the costs, including the costs which each party *separately* incurs, it is difficult, if not impossible, to understand the enactment. Again, the costs are to be settled and allowed by some justice. It can hardly be supposed that the legislature meant to impose upon a magistrate the duty of taxing attorneys' bills. Again, it is said that where a person, by reason of absence or disability, shall have been prevented from treating and agreeing, such costs shall be paid by the trustees, and be recovered by distress and sale. When a party takes no steps *he* can have incurred no costs; therefore it is clear that there could in such case be *no* costs to be *recovered by distress* and sale, except the costs which are payable to the under-sheriff. The Court will not put inconsistent constructions upon the same expressions in different parts of the same section.

(a) 1 Salk. 204.

(b) Ca. temp. Hardw. 355.

*Cresswell* contrà. This is an act of parliament obtained at the instance of certain speculators, enabling them to take the property of certain inhabitants of York, without their assent, upon merely paying such a compensation as a jury may think sufficient. It is to be considered as *their own* act, and ought to be construed most strictly *against them*, so that they must show, *with the utmost distinctness*, their right to any advantage which they claim under that act. When the trustees come before a jury, and by the verdict of that jury the sum which they have offered to a party whose premises they require for the purposes of their act, is declared to be an insufficient compensation, they are in the situation of persons who have lost a verdict; and why should they be in a better situation as to the *payment of costs* to the successful party? If it had been meant by this clause in the act to impose upon the trustees the liability to pay the costs of *holding* the inquest, there was no occasion for saying that the *persons entitled thereto* might recover by distress and sale. It would have been sufficient to say that such costs should be paid *to the sheriff*. *Rex v. Glastonbury* is in favour of the applicant; for Lord *Hardwicke*,—though the Court decided that in *that case* they would not give costs,—said, that if the party were entitled to *any*, he was entitled to the *whole* of the costs. Every statute which gives costs, is to be construed liberally, because the party succeeding is presumed to have been in the right. Then with regard to the argument that *expressio unius exclusio alterius*:—suppose a statute had said that in the ordinary cases of actions, the successful party should have the costs of the writ, of the pleadings, and of the trial, would not that have been sufficient to include *all* costs? This is an analogous expression. It has been argued that the legislature cannot have intended that the *magistrates* should tax attorneys' bills of costs. They are not required to do it *themselves*. They may refer the taxation of the costs to some proper officer, as is done in all the Courts. Then it is said that there can be no costs, such as the applicant

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contends are intended to be included in the term, in cases where a party, through absence or disability, has been prevented from *treating or agreeing*, but it by no means follows that such party cannot attend the inquest.

LORD DENMAN, C. J.—The dictum in *Salkeld*(a) is hardly consistent with the construction which the Courts have put upon the statute of Gloucester. In a case of this sort, however, I am clear that the statute ought to be construed *liberally* for the party to whom the costs are given. It is a part of the *price* paid by the trustees for the great powers which are given to them by the act. The statute gives the costs of the notices, precepts, and of summoning the jury and witnesses, *and also of the inquest*. This latter part must have a *distinct* meaning beyond that which precedes, and I think it must mean *all the costs* of the inquest. The observations which have been made on other parts of the act do not appear to me to have any direct bearing upon the question, and I do not think myself bound to reconcile all the parts of the act.

LITLEDALE, J.—By the 28th section it is provided that the sheriff is to summon and impanel a jury, and to summon and call before the jury and examine upon oath all persons who may be thought necessary, as witnesses, touching and concerning the premises. This must be considered as forming *part of the inquest*. An *inquest* is to be taken to be the same as *inquisition* (b). When a record *at nisi prius* is returned to the Court out of which it issues, the verdict taken is denominated an “inquisition.”

TAUNTON, J.—I do not think that the question in this case is at all dependent upon decisions as to costs in other cases. At common law there were no costs. The statute of Gloucester gave costs only where damages were reco-

(a) In *Cone v. Bowles*, *supra*, 688. *pleading*, was the “inquisition” of

(b) The “enquest” of the French the Latin *record*.

vered. Here, the only matter to be determined is, what is the meaning of the words "costs of the said inquest," as used in this act. I think this must mean the costs of the trial by the inquest, like the costs of a reference. The costs of counsel and other costs prayed for, ought, I think, therefore to be allowed.

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Lord DENMAN, C. J.—We think that the expenses of the surveyor in surveying ought not to be allowed.

Rule absolute.

BRIDGES v. BLANCHARD.

**TRESPASS** for breaking and entering the plaintiff's close, being a garden belonging and near to a dwelling-house of the plaintiff, and prostrating part of a wall of the plaintiff there standing. Plea: first, the general issue; secondly, that the wall was wrongfully erected on the adjoining close of the defendant, and that he entered to abate it; and thirdly, that the defendant was possessed of a dwelling-house contiguous to the close in which &c., in which dwelling-house there was and still of right ought to be a certain window, through which the light and air ought to have entered, and still of right ought to enter into the dwelling-house; and because the plaintiff had injuriously and wrongfully erected and placed the said wall in the said close, so as to obstruct and darken, and because the same did obstruct and darken, the said window, and hinder and prevent the light and air from coming into and through the said window, the defendant entered

*A., the side of whose house adjoined B.'s lawn, wrote to B. as follows: "Before the last coat of paint is put on the side wall, we wish to place a window in it, and our workmen say it can be finished off more neatly with your permission to place the necessary ladder, &c. The motive for doing this is, that I should gain a more cheerful view of the common, and passing objects." B. replied, "You are welcome to place a ladder in my grounds:" Held, that this did not amount to a licence by B. to A. to open a window in the side of A.'s house; and therefore that A. might obstruct the window by an erection on her own land. Whether a parol licence to have the light and air come unobstructed from A.'s land to a window to be opened in B.'s house, which adjoins A.'s land, can be revoked after the window has been opened, *quære*.*

Whether such a right can be conveyed by parol licence, or whether it is an easement which lies in grant, *quære*.

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to remove, and to a necessary degree knocked down the wall. Replication to the first plea, the similiter; and as to the other pleas, *de injuriâ*.

This action was tried before *Alderson, J.*, at the last summer assizes for Hampshire, when the following facts appeared:—

In the spring of the year 1833, the plaintiff and the defendant had each of them a house at Highfield, near Southampton; the defendant, at that time, occupying his, but the plaintiff not entering upon the occupation of her's until the summer of that year. In front of the plaintiff's house was a garden or pleasure ground, contiguous to which was the side of the defendant's house, in which side there had hitherto been no window. In the month of April or May, the defendant's wife wrote to the plaintiff the following letter:—

“My dear Madam,

“I beg to apologize for trespassing on your attention just now (*a*), but before the last coat of paint is put upon the side wall, we wish to place a window in it, and our workmen say that it can be finished off more neatly with your permission to place the necessary ladder, &c. The motive for doing this is, that I should gain a little more cheerful view of the common, and passing objects, which to me will be a pleasure, being so much a prisoner to the house, from my still delicate state of health,” &c.

To which the plaintiff returned the following answer:

“My dear Madam,

“A particular engagement this evening prevents my saying more than that you are welcome to place a ladder in my grounds near your house, and I shall be obliged to you if you will caution the workmen to be careful not to injure the shrubs,” &c.

The defendant then opened a window in the side wall of his house, which window opened a view into the plaintiff's garden and to the common beyond.

(*a*) The plaintiff was suffering from a domestic affliction.

The plaintiff subsequently wrote to the defendant's wife as follows:

"I think it right to be candid with you in expressing my regret that a window has been opened at the side of your house just immediately overlooking my premises at High-field; it cannot be otherwise than a great annoyance to me and my friends, and I shall leave it to your good feelings to judge how far you would oblige me by removing it," &c.

On February 23, 1833, the plaintiff wrote the following letter to the defendant's wife:—

"Madam,

"As I conceive you are fully aware of the very great annoyance your window overlooking my lawn is to me, you will not be surprised when I inform you that my intention is to shut it out this spring; but before I begin any plan, I should wish to hear from you if there is a probability of your removing it. Mrs. *Ludlow* named to me a few weeks ago, that you had told her you considered the window would not be required after your new drawing-room was finished. This leads me to hope that you do intend to remove it. Let me appeal to your good feelings, when you reflect on the unhappy period at which you applied to me for permission to place a ladder in my grounds; when my mind was in the utmost state of excitement from the very severe shock it had received; being also quite alone, and without a friend to advise with, and even without knowing exactly the situation in which your window would be placed, I unfortunately complied with your request, wishing to oblige you, without consulting in the least degree my own comfort and retirement, which latter, I must say, is indispensable to my happiness."

The defendant refusing to stop up the window, the plaintiff caused a wall to be erected along the side of the defendant's house. Through this wall the defendant made a hole opposite his window; and this was the trespass in respect of which the action was brought. It was contended for the defendant that the correspondence produced was evidence of a *licence* granted by the plaintiff to the defendant to open

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the window in question; but the learned judge being of a contrary opinion, directed the jury to find for the plaintiff, (which they accordingly did, with 1s. damages,) and gave the defendant leave to move for a nonsuit, upon the question whether the letters amounted to a licence. In last Michaelmas term, *Follett* obtained a rule nisi for a nonsuit, or a new trial, against which

*Dampier*, and *Smirke*, now shewed cause.

First point :  
Whether letters  
amounted  
to a parol  
licence to open  
window.

I. The question whether a parol licence to open the window was granted by the plaintiff to the defendant, arises entirely upon the two first letters of the correspondence between the parties; and it is submitted that, even supposing that the plaintiff, in her reply to *Mrs. Blanchard's* first letter, had said in express terms, "*I grant you all that you request*," it would not have amounted to a licence to make a window. *Mrs. Blanchard's* request was to place a ladder on the defendant's ground,—not to make a window; and the plaintiff in her reply gave no more than was asked from her. It may be said that the plaintiff must have known with what view the defendant requested permission to place a ladder; but mere knowledge of the intention is not sufficient to make a concession of part, amount to a concession of the whole of that which the party intended to do. A licence should be in clear, plain, and unambiguous terms. Suppose the defendant had asked for the loan of a ladder to enable her more conveniently to finish the window, and the plaintiff had granted the request,—could that have been construed into a licence to make the window? Assuming, however, that knowledge of the defendant's intentions would make the plaintiff's letter operate as a licence to make a window, there is not in this case evidence of sufficient knowledge to bring it within the rule. Where was the window to be placed? and of what size and form was it to be? There is nothing to shew that the plaintiff knew these particulars of the defendant's intentions; and for any thing that appears, she might have

supposed that the window was intended to be opened in a part of the defendant's house where it would not be an annoyance to her, or even in a part in which the defendant was entitled to place it *without any licence* from the defendant. According to the argument on the other side, this is a licence to break out a window of *any size or shape*, or in *any part* of the defendant's house. When this rule was moved for, considerable emphasis was laid upon the phrase in a subsequent letter, "I unfortunately complied with your request." This letter is equivocal, and is at most nothing more than the *plaintiff's* construction of that document which the *Court* is now called upon to construe.

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II. Assuming that the letters did in fact amount to a licence, that licence was revocable and had been revoked. There is no general rule that a licence *executed* is not countermandable, *Fentiman v. Smith* (a), *Doe v. Wilson* (b), *Rex v. Horndon on the Hill* (c), *Bryan v. Whistler* (d). Licences are irrevocable where they convey a *certain interest*, because in such case they may be considered as amounting to *leases or grants*, *Rex v. Winter* (e). So, where the act is to be done on the land of the *licensee* to the nuisance of the *licensor*,—is permanent in its nature,—and would, but for the licence, have given the licensor a *ground of action* against the licensee. Of this nature are the cases of *Winter v. Brockwell* (f), *Liggins v. Inge* (g), and *Mason v. Hill* (h). The window opened by the defendant in his own wall, although it overlooked the plaintiff's grounds, was no *legal* nuisance, and therefore the licence does not come within this class of cases.

Second point:  
Whether li-  
cence revoca-  
ble.

III. The licence, to be valid, should have been by *deed*; for in effect it is a *grant* of an *easement* over the land of the licensor. It is not a licence to the defendant to open

Third point:  
Whether a  
deed neces-  
sary.

(a) 4 East, 107.

(b) 11 East, 56.

(c) 4 Maule & Selw. 562.

(d) 2 Mann. & Ryl. 318; 8 Barn. & Cressw. 288.

(e) 2 Salk. 586.

(f) 8 East, 368.

(g) 7 Bingh. 691; 5 Moore & Payne, 712; *infra*, 696.

(h) 3 Barn. & Adol. 304, upon the first argument; and *ante*, ii. 747, upon the second.



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a window in his own wall; for that he might well do without licence, but to have a *free access* of light and air to the aperture *from the plaintiff's land*. The proof of the acquisition of rights to a free access of air and light, and to a free access of water, over the soil of another, is the same. A right to the free access of *water* from another's *soil* lies only in *grant*, and a grant must be by *deed*; *Fentiman v. Smith*(a), *Hewlins v. Shippam*(b), *Liggins v. Inge*(c), *Wright v. Howard*(d), *Mason v. Hill*(e), *Aldred's case*(f), *Barker v. Richardson*(g), *Canham v. Fisk*(h). The defendant has no right to a free access of light over the plaintiff's soil; for the effect of such a right must be to limit the plaintiff's enjoyment of her own freehold, inasmuch as she would, by that right in her neighbour, be precluded from *erecting* anything on *her own* land which would operate to *obstruct* the free access of light and air to his window. Such a right, therefore, to be acquired by another, must be given by the party whose natural right is limited by it, and being an *easement* over another's land, as it has been called in many of the cases, can be given only *by grant*, or acquired by such length of user as will raise a *presumption* of a *grant*. There are cases in which it has been held, that a person licensed by parol to do an act which limited another's enjoyment of his soil, cannot afterwards be treated as a *trespasser*; *Webb v. Paternoster*(i), *Wood v. Lake*(k), *Winter v. Brockwell*(l), *Liggins v. Inge*. But that is the utmost extent to which these cases go. Besides, *Wood v. Lake* has been much doubted; and, as was observed in *Hewlins v. Shippam*, the absence of a grant was not in that case made the ground of an objection. In *Winter v. Brockwell* the licence merely amounted to a release of actions for a nuisance created upon the licensor's own soil. In *Liggins v. Inge*, the defendant, by

(a) 4 East, 107.

(b) 7 Dowl. & Ryl. 783; 5 Barn. & Cressw. 221.

(c) *Suprà*, 695.

(d) 1 Sim. & Stew. 190.

(e) *Suprà*, 695.

(f) 9 Co. 58.

(g) 4 Barn. & Ald. 579.

(h) 2 Crompt. & Jerv. 128.

(i) Palmer, 71.

(k) Sayer, 8.

(l) 8 East, 308.

licence, cut down his own bank, and made a weir above the plaintiff's ancient mill, so that less water than formerly flowed to the plaintiff's mill; and it was held that the licensor could not *sue* the licensee for *continuing the weir*. The opening a window by the defendant in his own wall is *not actionable*; therefore no licence would be requisite to authorize *that*; and therefore these cases do not apply. It may be objected that it would appear, from the reasoning in *Liggins v. Inge*, that the plaintiff in this case may be said to *have relinquished* her right to the surplus flow of light and air to the defendant, by permitting the defendant to open this window. But supposing that this were so, the case of *Liggins v. Inge* is controlled by that of *Mason v. Hill*; and it may be answered that the question is not whether the plaintiff has relinquished her exclusive right to the light and air, for *that* she never possessed, but whether she *has* relinquished her right to erect upon her own land that which would prevent the free access of it to the defendant's window,—whether, in fact, she has relinquished her right to the exclusive enjoyment of her own *freehold*, in favour of another. In *Thomas v. Sorrell (a)* it is said, “A dispensation or licence probably passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful.” In *Moore v. Rawson (b)*, *Littledale, J.*, said, that the right to insist upon the non-obstruction and non-interruption of light and air, arises by a *covenant* not to interrupt the free use of the light and air. Now here there is no pretence for saying that there has been any *covenant*. When a party has expressly agreed by parol not to obstruct a window to be opened by another, who acts upon this agreement, a Court of *Equity* will entertain the case, and enforce the performance of the agreement, *because the parties have no remedy at law*. Possibly the breach of such an agreement by the licensor might form the ground of an action at law, but the agreement could give no indefeasible right to the free access of light and air.

(a) *Vaugh.* 351.(b) 3 *Barn. & Cressw.* 332.

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First and second points.

*Follett and Sewell*, *contra*. The defendant must establish two propositions; first, that the plaintiff did consent; and secondly, that that consent is irrevocable.

I. Under all the circumstances, it is impossible to say that the plaintiff was not aware that a window was intended to be opened on that side of the defendant's house which adjoined her own land. She knew the object for which the window was opened, and she is asked to allow the workmen to go into her grounds for the purpose (as she *must* have understood) of opening the window. From the plaintiff's subsequent letters, it is quite plain that she knew that the defendant's object in asking permission to place a ladder on her grounds was, that a window might be opened; which window, when opened, would overlook those grounds. There really can be no doubt but that the plaintiff gave the defendant a licence to open the window.

Third point.

III. But it is said that permission to open a window amounts to nothing, as any one may do *that* in his own house *without* licence from his neighbour; and that such permission might be rendered nugatory by building upon the land of the licensor, unless there be a grant *by deed* of the right to have the light and air free from obstruction, which right, it is said, is an *easement*. Such a right is *not* an *easement*. Light and air are *communis juris*, in which no one has any property, and which therefore no one can grant. A person who opens a window takes the light and air as *first occupant*, and by twenty years' enjoyment acquires a right to insist upon their not being obstructed by any building on his neighbour's land. A right to be acquired in such a manner cannot be said to be an *easement* on the land of another. The judgments of *Littledale, J.* in *Moore v. Rawson*, and of *Tindal, C. J.* in *Liggins v. Inge*, both support this definition of the nature of this right. Allusion has been made to the word "*covenant*" used by Mr. Justice *Littledale* in *Moore v. Rawson*. [*Littledale, J.* I did not mean that any parol agreement was sufficient. I used the word "*covenant*" as meaning in effect the same thing as

"grant." A covenant not to obstruct the light and air is in effect the same thing as a grant. But I thought that, technically speaking, "grant" was not the correct expression in such a case.] The question is, whether the consent should be by deed. The distinction is this:—where I consent to the doing of an act upon *my* land irrevocably, a deed is necessary; but where the act is to be done upon the land of the party to whom the consent is given, a licence *by parol* is sufficient, for in such case no easement upon the land of the consensor is conveyed. This distinction is laid down in the very elaborate judgment of this Court in *Hewlins v. Shippam*. In *Liggins v. Inge* the same distinction was taken, and *Tindal*, C. J., after using many arguments, which are in favour of the defendant's claim, puts this case:—Suppose *A.* authorizes *B.* by express licence to build a house on *B.*'s own land, close adjoining to the windows of *A.*'s house, so as to intercept part of the light, could he afterwards compel *B.* to pull the house down again, simply by giving notice that he countermanded the licence? The same reason which would prevent a party from bringing an action for, or abating as a nuisance, that which had been erected with his consent, must also prevent his rendering it nugatory by building before it. *Mason v. Hill* has been referred to as in some degree shaking the authority of this case, but so far is that from being the case, that on the contrary it confirms it. *Doe v. Pys* (a), *Ncale v. Parkin* (b), and *Doe v. Allen* (c), shew that the consent of a party to the doing of an act, to which he was entitled to object, may be presumed from the mere fact of his knowing what was going forwards, and making no objection.

IV. Where a licence, revocable at first, has been acted upon and expense incurred, it is no longer liable to be revoked, unless where the act is to be done upon the land of the consensor, and the consent is not by deed.

Fourth point:  
Expenses  
incurred.

(a) 1 Esp. N. P. C. 363.

(c) 3 Taunt. 78.

(b) Ibid. 228.

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LORD DENMAN, C. J.—This case has been argued with very great research, but it is not necessary to enter into the questions whether the licence should have been by deed, or whether it was revocable, as we think that in *point of fact* no consent was given, so as to authorize the pulling down of the wall by the defendant. The consent ought to be distinctly and clearly expressed. None such was here given. As this was taken by common consent to be a question on the construction of these letters, *for the judge* at the trial, we must dispose of the case on the question reserved. The first of the letters is as follows, (here his lordship read Mrs. *Blanchard's* first letter). This letter certainly does not imply that any licence to open the window had been previously given, nor does it appear to ask consent to any thing beyond the placing of a ladder on the plaintiff's grounds. It may be very true, that if the plaintiff had cautiously considered every word of this letter, she might have discovered an intention to make a window. But there is nothing to shew that the intention did appear to her. The extent of the request, in terms, is to place a ladder on the plaintiff's ground, and her answer was merely a permission to do so. There is not in this correspondence, any such particular consent to the act of opening the window, as I think is required. There is another letter, which was written by the plaintiff at a subsequent period, from which it is argued the necessary covenant may be imported. I think that it can *not*. That which occurred subsequently to the transaction itself, is in my opinion wholly immaterial.

I would observe that there is some doubt as to the sufficiency of the *pleadings* (a).

LITLEDALE, J.—It is referred to us to determine the question of law upon the construction of these letters, and it appears to us that these letters do not import a licence. All that was asked in the first letter, was permission to

(a) Upon special demurrer it might have been objected that the third plea should have shewn in what manner the right arose.

place a ladder. It is possible that Miss *Bridges* did not *know* her legal rights, although perhaps she *ought* to have known them. However that may be, Mrs. *Blanchard* did not *ask* for more than permission to place a ladder, and to that only was consent given. From the first two letters no licence can be inferred. Then it is said that the subsequent letter shews that she really had originally given consent to Mrs. *Blanchard's* having the air and light to come in at the window. I do not think that she at all admits that she *had* granted such a permission. She admits that she had "unfortunately complied with Mrs. *Blanchard's* request;" but that *request* was merely to place a ladder. It appears to me that the whole question rests on the first two letters.

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It is not necessary for us to discuss the other points which have been raised.

TAUNTON, J.—There is no necessity to enter upon the discussion of the general nature of easements, licences, grants, or revocations of licences, or of those things which must be given by parol licence, and those which lie in grant,—which has been argued at such length and with such a prodigious number of cases. The only question is, whether there *was* a licence; and that question depends on the first two letters of the correspondence; and I am clearly of opinion that *no* licence or assent to *make a window* was conveyed by the letter of the plaintiff. The letter says, "our workmen say that it (the window) can be finished more neatly with your permission to place a ladder." And the *motive* is certainly stated in the letter to be, that Mrs. *Blanchard* may obtain a more cheerful view; so that it certainly implied that it was intended to open a window; but still the only *request* is, that the plaintiff should assent to *the ladder's being placed* upon her land. The answer is, "you are welcome to *place a ladder* in my grounds." Both the request and the assent were to *place a ladder*. The circumstance of the defendant's having the ulterior object of obtaining a prospect by open-

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ing a window, cannot be considered as operating to make the plaintiff's letter amount to a consent to the making of the window. The plaintiff could not be apprised of the length, the breadth, the width, or the precise situation of the window. She might have serious objections to a window of one size and in one place, and not to one of another size or in another situation. All that appears by the letter is, that it was intended to open a window on that side of the defendant's house which adjoins the grounds, and that it was to look upon the common. It does not at all appear that the plaintiff was apprised of the particulars. The subsequent letter does not shew that the plaintiff had given permission to open the window, or that she knew the particulars respecting the window intended to be opened.

It is not necessary to consider whether the subsequent letter amounted to a *countermand*. I am disposed, however, upon the authority of the case of *Liggins v. Inge* (a), to think that if the licence *had* been granted, that which took place between these parties could *not* have operated as a countermand.

WILLIAMS, J.—I am also of the same opinion; and I think it perfectly clear that the letters contain no licence for the making of the window in question.

Rule discharged.

(a) *Suprà*.



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## COLLINS v. CARNEGIE.

**CASE** for words. The first four counts, after an inducement stating that the plaintiff was a *physician* and exercised the profession of a *physician* at Wimborne, Dorsetshire,—charged the words to have been spoken of and concerning the plaintiff in his profession of a physician, and of and concerning the plaintiff as not being a physician, nor legally entitled to exercise or practise physic in England, and of and concerning the plaintiff as being guilty of imposture by exercising and practising physic, and being, from his character and conduct, unfit to be employed, trusted, or consulted in his said profession. The words, as laid in these several counts, contained a denial of the plaintiff's being entitled to practise as a physician (a).

The fifth count alleged, that the plaintiff was a *physician, and surgeon and man-midwife*, and had used and exercised such professions, and charged the words laid in that count to have been spoken of the plaintiff in his professions of a physician, surgeon, and man-midwife.

The sixth count charged the words laid in that count to have been spoken of the plaintiff in his profession of a *man-midwife*. Plea: Not guilty.

At the trial before *Alderson, J.*, at the last Dorsetshire summer assizes, the words laid were proved, and were admitted to be actionable, supposing them to have been spoken of

(a) The words, as laid and have inquired at the different colleges: he is a quack, an impostor, Joseph Collins is no Doctor, for I a whoremonger, and a drunkard."

a physician, but also that he practised *lawfully*.

A person, being previously a stranger to the place, goes to a town which is the seat of a university, and is told that a certain building is the college, that a certain person whom he sees in it is the librarian, and this person shews him a seal in his custody, which he states to be the seal of the university, and produces a book which he states to be the Book of Acts (statute book) of the university, and such person compares such seal with the seal upon a diploma, the genuineness of which is in question, and makes a copy (which is duly examined) from such Book of Acts of an entry of an act conferring the degree of M.D.: Held, that the diploma is; sufficiently authenticated, and the act conferring the degree properly proved.

A person created a Doctor of Medicine by a Scotch university cannot practise as a physician in England, unless licensed by the College of Physicians.

A fortiori, where the degree is granted without residence.

In an action of slander for words spoken of the plaintiff as a physician, importing a denial that the plaintiff is duly qualified to practise as a physician, the plaintiff must, under the general issue, prove the inducement in the declaration, alleging that the plaintiff had exercised the profession of and was a physician, and shew not only that he practised as



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the plaintiff in the several professions of physician, surgeon and man-midwife. Upon the first five counts, the struggle was as to the sufficiency of the proof of the plaintiff's possessing the character of a *physician* qualified to practise as such in England. The evidence given by the plaintiff in support of the allegation in the declaration of his being a physician, was as follows:—He had been for some years in practice as a physician at Wimborne, though he also acted as an apothecary in dispensing medicines. In addition to the evidence of *acting* as a physician, the plaintiff produced an instrument purporting to be a diploma from the University of St. Andrew's, Scotland; and in order to prove the authenticity of such diploma he called a witness, who stated, that he had lately been to St. Andrew's, taking with him the diploma, where he had seen three of the professors of the university, (one of them being the librarian,) who had acknowledged that certain of the signatures to the diploma were their genuine signatures; that the librarian shewed him the university seal, which corresponded exactly with the impression on the diploma; and that he had shewn him the Book of Acts of the University, from which the witness made a copy (which was duly examined there) of an entry of an act conferring the degree of Dr. of Medicine on the plaintiff. It appeared on the cross-examination of this witness, that he had not known the university of St. Andrew's until he went to it for the purpose of obtaining the above evidence, that he had not been previously acquainted with the librarian or the other professors, that he had never before seen the seal or the Book of Acts; and that his belief that the place which he had visited was the university of St. Andrew's, that the persons whom he had seen were the librarian and professors of the university, that the seal was the university seal, and that the book from which he had copied the entry was the Book of Acts of the university, was founded entirely upon information received on that occasion from various persons. The plaintiff, it appeared, had never resided in the university, or gone through any course of

study there; and he had not been licensed by the College of Physicians. The defendant objected, that the evidence of the plaintiff's having *acted* as a physician was insufficient to support the counts; that the evidence given as to the authenticity of the diploma was insufficient, as being founded upon hearsay only; and that supposing the evidence of the authenticity of the diploma to have been sufficient, the possession of a diploma from a Scotch university did not entitle the plaintiff to practise as a physician in England. Under the sixth count evidence was given of the plaintiff's having acted as a man-midwife. The learned judge told the jury that he thought the evidence of the plaintiff's having acted as a physician was sufficient *primâ facie* evidence of his possessing that character, and of his having been duly licensed to practise as such in England, if such licence were necessary, but he left this evidence to the jury in conjunction with the diploma, and the copy of the entry in the Book of Acts, the authenticity of which he considered to have been established, and which, he told them, (*hæsitanter*,) authorized the party to whom it was granted, to practise as a physician in England, without a licence from the College of Physicians. His lordship also directed the jury, that evidence of the plaintiff's having acted as a man-midwife, was sufficient to authorize them to give a verdict on the sixth count; and he requested them, if they thought that the plaintiff had sustained damages in *both* professions by reason of the slander, to separate the damages sustained in the two capacities. The jury found for the plaintiff, and assessed the damages separately, those found upon the sixth count being 10*l.* In last Michaelmas term *Coleridge*, Serjt., pursuant to leave reserved to him at the trial, moved for a rule to shew cause why the damages should not be reduced to 10*l.*, by entering a verdict for the plaintiff on the last count only, and for the defendant upon the other issues.

*Barstow* now shewed cause. The evidence of the plaintiff's having *acted* as a physician, is *primâ facie* evidence of

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 as a physician  
 sufficient.

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right to do so. It lay, therefore, on the defendants to shew by evidence, that the plaintiffs did not legally possess that character. The declaration proceeds simply on the fact of the defendant's having practised as a physician. [Lord Deuman, C. J. *You set up the Scotch diploma.*] The plaintiff unnecessarily gave evidence of it. In *2 Starkie on Slander(a)* it is said, that where a plaintiff avers generally that he filled any particular situation or office, in which he has been calumniated, or that he exercised any particular profession or business, it is sufficient to give general evidence of his having acted in that office or situation, or of his having exercised that particular profession and carried on that trade or business; and then the author puts the case of a declaration for slander, alleging that the plaintiff was a *magistrate or peace officer*, for which he cites the opinion of *Buller, J.*, in *Berryman v. Wise(b)*; and that of a declaration alleging that the plaintiff was an *attorney of such a Court*, for which he cites the case of *Berryman v. Wis.* Afterwards it is added, that it has been doubted, whether, under an allegation that the plaintiff was at the time of the alleged slander a *physician*, it was necessary to produce a diploma, and the judges of the Court of C. B. were, in the case of *Smith v. Taylor(c)*, equally divided upon this question. [Lord Denman, C. J. In *Pickford v. Gutch*, cor. *Buller, J.*, at the Dorchester summer assizes, 1787, which was an action for calling the plaintiff a quack, that learned judge held, that the diploma ought to be produced, although the allegation in the declaration, as to the profession of the plaintiff, was only that the plaintiff had used and exercised the profession of a physician. Here, however, the two kinds of evidence, namely, that of the diploma and of the practising, were left together to the jury. It may be, that they were satisfied with the diploma and did not consider the practising; therefore we cannot know whether that was sufficiently proved.]


(a) Page 2.

(c) 1 N. R. 196.

(b) 4 T. R. 366.

The diploma itself, it is submitted, is sufficient. *Moises v. Thornton* went off entirely upon the ground that there was no sufficient evidence of the authenticity of a diploma of St. Andrew's. If a Scotch diploma was useless, why did the Court enter so much at length into the question as to the evidence of its authenticity? Their impressions clearly must have been, that the diploma, if proved, was sufficient. In *Smith v. Taylor(a)*, Sir *Jas. Mansfield, C.J.*, said, "since the union with Scotland, it has been considered, though I do not exactly know upon what ground, that a degree conferred by a Scotch university is of the same effect as a degree conferred by the universities of Oxford or Cambridge;" and then proceeds in a manner that shows that he considered that the general understanding ought not to be disturbed. The other judges, two of whom differed from Sir *Jas. Mansfield* upon the point, as to whether, under the declaration in that case, it was necessary to give any direct evidence of the plaintiff's being a physician, appear to have agreed with him upon the question as to the sufficiency of a Scotch diploma. *Rooke, J.*, clearly thought that there was no difference in this respect between English and Scotch universities. In no case has the College of Physicians, since the union of England and Scotland, taken any proceedings against persons for practising in England as physicians with Scotch diplomas.

With regard to the evidence of the authenticity of the diploma, it is submitted that it was abundantly sufficient. It goes much farther than the evidence given in *Moises v. Thornton(b)*.


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 Second point:  
 Qualification  
 to practise as  
 a physician in  
 England by  
 virtue of a  
 Scotch di-  
 ploma.

Third point:  
 Evidence of  
 authenticity of  
 diploma.

*Coleridge, Serjt., contra.* The second point is the most material; and here the question turns entirely upon the acts of parliament relating to the subject. These are, 3 *Hen. 8, c. 11*, sections 1 and 3, and 14 & 15 *Hen. 8, c. 5*, section 3. In the act of 14 & 15 *Hen. 8*, which particularly relates to physicians practising out of London, the only persons exempted from examination are, *Graduates of Ox-*

(a) 1 N. R. 136.

(b) 8 T. R. 303.

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*ford and Cambridge, who have accomplished all things for their form without any grace.* Yet at the time, as history testifies, a large majority of the physicians were men educated at colleges on the continent, as Padua, Bologna, and Leyden (a). With regard to the observation, that there is no case in which the College of Physicians have brought an action against a person practising as a physician in England with a Scotch diploma, and without a licence from the College of Physicians, it is to be remembered, that the power of the college to bring actions only exists in the case of persons practising without a licence within London or a precinct of seven miles around it; *College of Physicians v. Levett* (b), *College of Physicians v. Dr. West* (c). The only question that can arise is, whether the act of Union (d) contains any article by which the exception in 14 & 15 Hen. 8, in favour of graduates of the universities of Oxford and Cambridge is extended to the Scotch universities; and it is confidently submitted, that nothing in that act can have the effect contended for. The only part which relates to the Scotch universities, is article 25, embodying an act of the parliament of Scotland, "For securing the Protestant Religion and Presbyterian Church Government, within the Kingdom of Scotland;" and all that is there said is, (sect. 3,) "that the universities and colleges of St. Andrew, Glasgow, Aberdeen, and Edinburgh, as then established by law, should continue within that kingdom for ever." The object of this clause was evidently their preservation as places of education for the established church, not the extension of their privileges into England, or the extending to them the privileges of the English universities. This question has not often come under discussion. That which is said by Sir Jas. Mansfield in *Smith v. Taylor* is not of much weight, for he merely speaks of the common understanding, the ground of which, he says, he does not know; and he admits that he finds


(a) Qu. *Louvain*. The foundation of the university of *Leyden* is celebrated as having taken place on the 8th February, 1575.

(b) 1 Lord Raym. 472.

(c) 10 Mod. 353; *infra*, 711, 712.

(d) 5 Ann. c. 8.

nothing upon the subject in the act of Union. He cannot be said to have been followed by any other judge. The exemption in 14 & 15 *Hen.* 8, extends only to graduates of Oxford and Cambridge *who have accomplished all things for their form without any grace*; therefore, supposing the Scotch universities to be by the operation of the act of Union virtually included in the clause, still the graduates of these universities would not be exempted, unless they had accomplished all things for their form without any grace, which was not the case here. In *Jones v. Smart* (a) the question did receive something like a decision, although it arose as a question upon the game laws. *Erskine* argued, that a doctor of physic, who had taken his degree at either of the English universities, was a person qualified to kill game, and that a Scotch diploma conferred the same privileges; and, as to the latter point, he argued upon the fourth article of Union, which says, that there shall be communication of all rights, except where it is expressly agreed on to the contrary. Lord *Mansfield*, upon the close of the argument, said, he had no doubt that all privileges granted by the statutes to the universities were confined to our own, and did not extend to Scotland or other countries. And the Court, having taken time to consider, Lord *Mansfield* and the other judges delivered their opinions seriatim, and the former opinion of Lord *Mansfield* was confirmed. [*Taunton, J.* Suppose a party to be a physician, and not licensed, and to practise, what is the penalty?] There is none; but it is against law, being forbidden by 14 & 15 *Hen.* 8. [*Taunton, J.* I do not see at present why it should be requisite to prove, not only that the plaintiff is a doctor duly created, but also that he is a physician duly licensed.] The jury have found damages for injury to his practice—but he cannot be entitled to claim damages for injuring his practice, that practice being itself illegal. Although no action will lie *for a specific penalty* against a foreign physician, who practises in England without being duly licensed,

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(a) 1 T. R. 46.

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Second point.

yet, as it is forbidden by law, an indictment will lie for the breach of that law. If the prohibition were not enforced, the proviso in favour of the universities of England would be nugatory.

Third point.

As to the evidence of the diploma. It resembles the evidence given in *Moises v. Thornton* (a). It is all bottomed on *hearsay*. A stranger goes to a place which he is *told* is St. Andrew's. One person *tells* him a particular building is the college, another, that an individual is the librarian, and so on. [*Littledale, J.* May you not say the same of a person who examines a record? It is very nearly the same thing.]

LORD DENMAN, C. J.—We have no doubt that a plaintiff complaining that he has been slandered in his profession by a defendant, who, as his words shew, denies that the plaintiff lawfully belongs to that profession, must prove that he exercises the profession, and that he does so *lawfully*. I think, therefore, that the evidence as to the diploma was necessary. The evidence that was given I think sufficient. If it were not, scarcely any thing could be capable of proof. Whether a Scotch diploma, without a licence from the college of physicians, does or does not authorize a party to practise as a physician in England, is a question which we think too important to decide without more consideration.


*Cur. adv. vult.*

On a subsequent day, the judgment of the Court was delivered by

LORD DENMAN, C. J.—The question on which we deferred our judgment in this case,—whether a Doctor of Medicine, by virtue of a diploma given by a Scotch university, can lawfully practise in England beyond seven miles from London without a licence from the College of Physicians, appears to be decided by a careful perusal of 14 & 15

(a) *Supra*, 707.

*Hen. 8*, c. 6, which confirms that body's charter of incorporation. It sets forth verbatim the Latin charter, one of the provisions of which is, "quod nemo in dictâ civitate, aut per 7 milliaria in circuitu ejusdem, exercent dictam facultatem, nisi ad hoc per dictum præidentem et communiatem admissus sit, sub poenâ c. solidorum pro quolibet mense." But the third section, reciting "that in dioceses out of London it is not light (a) to find always men able sufficient to examine (after the statute), such as shall be admitted to exercise physic in them," enacts, "that no person from henceforth be suffered to exercise or practise in physic through England, until such time as he be examined at London by the said president and three of the said elects, and have from the said president and elects letters-testimonials of their approving and examination, except he be a graduate of Oxford or Cambridge, which hath accomplished all things for his form, without any grace." The statute referred to in the recital is the 3 *Hen. 8*, c. 11, which under the same penalty enacts, "that no physician or surgeon shall practise in London, or within seven miles of it, without examination by the bishop of London, or the Dean of St. Paul's and four doctors of physic, nor out of the city and precinct of seven miles, but if he be first examined and approved by the bishop of the diocese, or his vicar-general, calling to him such expert persons in the same faculty as their discretion shall think convenient." The first-mentioned statute, therefore, vests in the president and elects of the College of Physicians that power of examination which the former statute had given to the Bishop of London and other persons. The statute was acted upon by Lord *Holt* at nisi prius, in the *College of Physicians v. Levett* (b), where even a doctor of physic at Oxford was held liable to the penalty for practising, without previous examination by the college in London; and the same opinion was expressed by Lord *C. J. Parker* and the whole Court in the *College of Phy-*

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(a) Easy (Germ. *leicht*).

(b) 1 Lord Raym. 472.



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*sicians v. Dr. West (a).* The statute, indeed, imposes no penalty on unlicensed practitioners beyond the seven miles, but the prohibiting words are strong enough to make the practice *unlawful*. This action cannot, therefore, be maintained for slander of the plaintiff, in a profession which, by law, he could not exercise: and, according to the leave reserved at the trial, a verdict must be entered for the defendant on the counts which charge him with such slander.

It only remains to be observed, that the dictum of *Mansfield*, C. J. (*b*), on which the plaintiff's counsel relied, as shewing that the Scotch universities have the same privilege as the English, does not appear to us to prove even that that was his opinion. The act of Union certainly does not warrant the position; and even if it did, the privilege is granted in favour of such degrees only as are obtained *without grace*; a circumstance which was not proved with respect to this plaintiff's diploma.

Rule absolute.

(a) 10 Mod. 353; *suprà*, 708.

(b) 1 N. R. 203.

#### EADEN and another v. TITCHMARSH and WALLIS.

Whether the ordering of goods by one overseer for the use of the parish, creates a contract binding upon a co-overseer, is a question of fact, depending on the particular circumstances of each case.

**DEBT** for the price of coals sold and delivered. *Titchmarsh* pleaded nil debet, *Wallis* suffered judgment by default. At the trial at Cambridge before the undersheriff, the following facts were proved. The defendants were at Lady-day 1828 appointed overseers of the parish of Kingston. It is the custom of the parish for the two overseers to continue in office for two years, one of them acting as such in each year. *Titchmarsh* acted up to Lady-day 1829, a short time previously to which he paid to the plaintiffs 18*l.* for coals supplied for the use of the parish during the time that he had been in office. At Lady-day 1829, *Wallis* became the *acting* overseer, and during the year of his acting, coals were supplied by the

plaintiffs to *Wallis's* servant who came with *Wallis's* cart, and who sometimes brought with him a written order from his master. The coals were taken by the servant to *Wallis's* house, and by him the poor were supplied either gratis or at small prices. Credit was given by the plaintiffs to the parish of Kingston. No witnesses were called on the part of *Titchmarsh*, whose counsel rested his case upon the argument urged first to the under-sheriff as matter of law, and afterwards to the jury as matter of fact, that the contract was with *Wallis* alone. The under-sheriff desired the jury to consider whether the coals were supplied for the parish and by whom the order was given, and to say whether, according to the evidence, credit was given by the plaintiffs to the defendant *Wallis* solely, or to both the defendants jointly as overseers of Kingston, and directed them that if they should think that they relied upon the sole responsibility of *Wallis*, then they should find a verdict for *Titchmarsh*, but if otherwise, then for the plaintiffs. The jury found a verdict for the plaintiffs, and added, that they considered that the coals were supplied to the parish, and that the defendants were jointly liable as overseers. The under-sheriff, upon returning the writ of trial, certified in pursuance of 3 & 4 Will. 4, c. 42 (a), that judgment ought not to be signed until *Titchmarsh* should have had an opportunity to apply to the Court for a new trial; and he further certified, that upon the trial leave was given to move the Court to set aside the verdict and enter a nonsuit.

*F. Kelly* in this term obtained a rule nisi to enter the verdict for the defendants, or to enter a nonsuit, or for a new trial, upon the ground that there was not sufficient evidence to support the finding that *Titchmarsh* was liable jointly with *Wallis*, and that the observation made by the jury upon giving their verdict, shewed that they proceeded


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(a) Sect. 18.

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upon the supposition that a joint liability of the two overseers was necessarily to be implied from the circumstance of the goods having been supplied to the parish. *Malkin v. Vickerstaff* (a), *Rex v. Justices of Gloucester* (b), and *Rex v. Justices of Essex* (c), were cited.

*Biggs Andrews* now shewed cause. Where goods are supplied for the use of a parish, all the overseers are *prima facie* liable for the payment, *Simmons v. Wilmott* (d), *Lamb v. Bunce* (e), *Watson v. Turner* (f). It is not sufficient for *Titchmarsh* to say that he did not give the order: he must go further, and shew that the plaintiffs dealt with *Wallis* in his *personal* character. *Malkin v. Vickerstaff* was an action against one overseer for money paid at the *express request* of another overseer. The second objection made in that case was, that there was no such *privity* between overseers as could make one of them liable for contracts of the other of which he had no knowledge; and the Court held, that whether or not the defendant was a party to the contract, was a question for the *jury*. The question submitted to the jury in the present case was similar to that which was put to them in *Malkin v. Vickerstaff*. Persons contracting with the parish would suffer extreme hardship if it were otherwise; as the overseer giving the order might be insolvent. *Malkin v. Vickerstaff* is a much stronger case than this. All that appears here is, that the coals were *delivered* to *Wallis*, and there is nothing to separate *Wallis* from *Titchmarsh*. In *Malkin v. Vickerstaff* the contract was made expressly with *one* alone of the co-overseers. The claim of third parties cannot be altered because one overseer acts for one year, and another for another year. This is a mere private arrangement, and is moreover a kind of arrangement which

(a) 3 Barn. & Alders. 89.  
 (b) 1 Barn. & Adol. 1.  
 (c) 3 Barn. & Adol. 941.

(d) 3 Esp. N. P. C. 91.  
 (e) 4 Maule & Selw. 275.  
 (f) Bull. N. P. 129.

is inconsistent with the statute of *Elizabeth* (a), and which therefore ought not to be entered into at all.

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*F. Kelly* and *Austin* in support of the rule. There is nothing in the character of overseers which renders them liable in respect of contracts made by their companions in office, even though those contracts be for the supply of goods *for the parish*. In the cases cited, the contracts were within the scope of the office of overseers:—money was paid for the relief of the poor. *Malkin v. Vickerstaff* may shew that this is a question for the jury, but it assumes that there is nothing in the character of overseer which renders him liable to *all* the contracts of his companion in office. The question to be submitted to the jury is, not whether the *plaintiffs trusted* the two overseers, but whether both the overseers were *parties to the contract*. Unless the Court is prepared to decide that the mere fact of being overseer renders a party liable for the contracts of his co-overseer, this rule must be made absolute. There was no evidence that the plaintiffs *did* rely on the joint responsibility of both the defendants, still less that they contracted with both.

LORD DENMAN, C. J.—In all these cases the question whether the overseers are jointly liable, or whether one only is so, has been considered to be a question of evidence. Material evidence was given that the contract was *jointly* entered into. No mistake was in this case made by the under-sheriff. He does not desire the jury to consider *only* to whom credit was given, but he says they are to consider whether coals were supplied *for the parish* and *by whom the order was given*, and to say whether, according to the evidence, credit was given by the plaintiffs to the defendant *Wallis* solely, or to both defendants jointly as overseers.

(a) 43 *Eliz.* c. 2.

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LITTLEDALE, J.—I am of the same opinion. There is in this case evidence of a joint contract.

TAUNTON, J. and WILLIAMS, J. concurred.

Rule discharged.

In the Matter of KING, Gent. one &c.

In affidavits in support of a rule to strike an attorney off the roll, it is not sufficient, for the deponent to state facts from which such misconduct may be inferred, without directly asserting their belief that the party charged has been actually guilty of such misconduct.

A Rule had been obtained calling upon Mr. King to shew cause why he should not be struck off the rolls, on the ground that he had allowed A. B., who resided at a distance from Mr. King, and who was not admitted as an attorney, to practise in his name.

Sir James Scarlett now shewed cause, and objected that it was not stated in any of the affidavits that, according to the information and belief of the deponents, Mr. King had been guilty of any offence charged by the affidavits. [Lord Denman, C. J. referred to *Ex parte Garbutt* (a).]

F. Pollock in support of the rule. Such facts are stated as lead to the inference that the charges are true. In *Clark, in re* (b), an attorney was struck off the rolls for a similar offence upon proof of the facts. Lord Tenterden there says, "I disclaim for myself any wish to proceed in a case like this upon mere *suspicion*; but we are to ask ourselves this question, (which is not unfrequently asked in summing up a case to the jury,) adverting to the evidence before us, are our own judgments satisfied, are our minds convinced that the crime charged has been proved to our satisfaction and conviction?" That conviction may arise as well from collateral circumstances as *from direct and positive proof*. [Lord Denman, C. J. That does not affect

(a) 2 Bingh. 74; 9 B. Moore, 157.

(b) 3 Dowl. & Ryl. 262.

this question. *Williams, J.* I recollect moving for a criminal information, when *Holroyd, J.* said, that unless it was sworn that the parties acted from corrupt motives, the rule could not be granted.]

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Lord DENMAN, C. J.—That is very excellent sense, and the observation goes beyond this case. We think that the foundation is not laid.

Rule discharged.

SALTER and BALSTON v. SLADE (in error).

**ASSUMPSIT** was brought by *Slade*, the defendant in error, against *Salter* and *Balston*, the plaintiffs in error, on the common money counts, in "The Weekly Court of Record of the Town and County of Poole" (a). The declaration stated that *Salter* and *Balston* were indebted to *Slade*, within the jurisdiction of that court, and also that

A court of error is bound by the transcript of a record which is sent up under the rule to certify the record.

(a) This court was created by a charter granted in *Parliament*, (see 3 Mann. & Ryl. 474, 482 (a),) 23 June, 10 *Eliz.* (1568), by a clause, of which the following is a translation: "And moreover, being abundantly willing to shew favour to the mayor, bailiffs, burgesses and commonalty of Our town of Poole aforesaid, and of Our certain knowledge and mere motion, We have granted, and by the tenor of these presents as much as in Us lies, do grant unto the said mayor &c. and their successors, of the

town aforesaid, that the mayor &c. of the town aforesaid, and their successors for ever, may have and hold the court of Us and Our heirs in the Guildhall aforesaid, before the mayor of the town aforesaid and the senior bailiff of the town aforesaid, for the time being, on Thursday in every week; and that they may for ever hold in the court aforesaid all pleas of debt, covenant, detinue, trespasses, actions upon the case, accounts, and all other personal pleas, to be levied and affirmed in

Such transcript is to be considered in the court of error as the record of the court below.

The court of error cannot amend such transcript.

Whether an inferior court of record can, after verdict, amend the pleadings, *quære.*

Whether any court can do so, *quære.*

Whether, in indebitatus assumpsit in an inferior court, an omission to state that the debt accrued within the jurisdiction, it being alleged that the defendant was indebted within the jurisdiction, and that the promise was made there, is error, *quære.*

Where costs are taxed upon a judgment, such taxation is to be considered as the period at which final judgment is pronounced, *semble.*

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they, *within the jurisdiction*, promised to pay, but did not state that the money was lent, &c. within the jurisdiction. *Balston* suffered judgment by default, and *Salter* pleaded the general issue. At the trial, which took place on 2nd

that court, before the mayor and senior bailiff aforesaid, and also arrest the person against whom such actions and complaints shall happen to be brought or prosecuted in the said court by legal process, and cause their goods and chattels, within the town, liberty and precinct aforesaid, to be attached, and their bodies to be committed to the prison of the town of Poole aforesaid; and hold all their pleas of lands and tenements in the court aforesaid, on the said Thursday, from fifteen days to fifteen days, and there hear and determine all the pleas aforesaid, and the pleas of Our Pipowder Court, and give judgment thereon, and cause execution to be made out thereon in the same manner and form, and proceeding, as in Our said town of Southampton heretofore the same were accustomed to be heard, and determined and executed: And that they the said mayor &c. from henceforth for ever shall have cognizance of all pleas, as well real as personal and mixed, and of all other pleas whatsoever of lands and tenements being within the town, liberty and precinct aforesaid, and also of all pleas of assize, novel disseisin, mort d'ancestor, re-disseisin, attainments, and also pleas of debt, covenant, detinue, account, trespass, and contract of what kind soever, and other pleas of what kind soever, issuing and to be issuing within the town, li-

berty and precinct aforesaid, brought or to be brought in any of Our courts, viz. before Us, Our heirs and successors, or before Us, Our heirs and successors in the Court of Chancery of Us, Our heirs and successors, and also before the treasurer and barons of the Court of Exchequer of Us, Our heirs and successors, attested and certified, taken, assigned and to be assigned, at any assizes, by the justices of Us, Our heirs or successors, and other justices and other officers of whatsoever kind, of Us, Our heirs or successors: And that the aforesaid mayor and senior bailiff for the time being, from time to time, may hold and determine all such pleas before the said mayor and bailiffs, in the Guildhall of the town aforesaid, and the judgment given thereon duly do and execute or cause the same to be done and executed: And further We grant and give licence by these presents, for Us, Our heirs and successors, to the before-mentioned mayor &c. and their successors aforesaid, that they, the mayor and bailiffs aforesaid, may in all and singular suits and complaints, actions and demands, brought before them within the town aforesaid, either at the suit of Us or any other person whatsoever, attach the bodies of the defendants in such suits, actions, causes and demands, if such persons have not sufficient lands, tenements, possessions and goods,

January, 1834, *Slade* obtained a verdict for 144*l.* 9*s.* 4*d.* (a) Before however this verdict was returned, *Salter* caused to be delivered to the prothonotary of the court a writ of error, notice of which was on the same day given to *Slade*. On the 8th of January this writ of error was allowed by the judges of the court. On the 13th, a copy of the allowance was served on the prothonotary. On the 14th, the costs were taxed in the presence of the attorneys on both sides. On the 15th of January *Salter's* attorney was served with a rule to certify the record, and he in consequence applied for a transcript of the record, which the prothonotary stated he had not yet prepared. On the 22nd *Slade* applied to "The Weekly Court of Record" for leave to amend the record, by inserting the words "then and there" in the statement of the creation of the debt, and obtained a summons requiring *Salter* or his attorney to attend on the following day at the court, to shew cause why such leave should not be granted. *Salter's* attorney attended in pursuance of the summons, and objected that the court had no authority to amend after the allowance of a writ of error. The court however, being satisfied that the loan in respect of which the action was brought and the verdict obtained, had been made within the jurisdiction, ordered the record to be amended by inserting the words "then and there" before the words "lent by the plaintiff to the defendant." Final judgment was not signed until after the record had been so amended.

The transcript sent up to this Court with the writ of error being in the amended form, *F. Pollock*, in Easter term, obtained (in the bail court) a rule to shew cause why the transcript should not be amended, by striking out the

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and commit such persons to Our prison within the same town, in the same manner and form as Our sheriffs of London may attach, and commit to prison the bodies of any defendants not able to make satisfaction in such suits, causes, actions and demands, as

are brought against them within the same city."

(a) This court holds plea, under the clause in the charter above set forth, to any amount, where the cause of action arises within the jurisdiction. In this case the damages were laid at 3000*l.*



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words which had been introduced in pursuance of the order, and making the transcript correspond with the record, in the form in which the record had stood when the writ of error was allowed. *Follett*, for *Slade*, obtained a rule nisi to quash the writ of error. Both writs came on to be argued together in this term.

*Follett and Butt, for Slade.* The Court has no authority to amend the transcript. [*Taunton, J.* In a case before me in the bail court, during the last term, which is still pending, a point arose which was very similar to this. The case was this: the cause was tried in the Borough Court of Liverpool, before the mayor and bailiffs, assisted by the recorder; and the plaintiff recovered damages under 40s. The recorder certified, *in open court*, that the plaintiff had probable cause to sue for a greater amount, according to the provisions of the Act establishing a Court of Requests at Liverpool. In the certificate, as drawn up and entered on the record, it was not stated that it had been granted *in open Court*. A writ of error having been issued and allowed, the transcript was sent up in this imperfect form. The court below, upon an application subsequently made, amended the record, by inserting a statement that the certificate was granted in open court; and the application before me was to amend the transcript, so as to make it agree with the amended record. I rather think it may be done.] This case is the converse of that. Here the amendment was made before the transcript was sent up. That application was to make the transcript *agree* with the amended record: *this* to make them *vary*. There is no case in which the Court have altered the transcript of a record so as to make it differ from the *existing* record of the court below, and there *are* authorities to the contrary; *Mellish v. Richardson* (*in error*), where it was held, in this Court (*a*) and in the House of Lords, that it was not *competent* to a court of error to examine into the propriety of amend-

(a) 7 Barn. & Cressw. 819. And see *Richardson v. Mellish*, 3 Bingh. 334; 11 B. Moore, 104, in C. P.

ments of the record made by the court below, where that court is a court of record, and that the court of error is *bound* by the record as it comes before them. In that case the amendments were very important, and the strong point of the argument was, that the court below had no authority to make the amendment. If the parties here say that the court below had no power to amend, they should have applied for a *mandamus*. This Court cannot falsify the record by altering the transcript *upon affidavits*. Were they to do so, they would in fact make two records, differing from each other. If the court below had made an alteration *since* the transcript had been sent up, as in the case mentioned by Mr. Justice *Taunton*, the Court might, upon the authority of *Mellish v. Richardson*, have made the transcript to be in conformity with the record below. [*Littledale, J.* In contemplation of law, it is *the record itself* which is removed. I do not see therefore how we can act upon this rule, framed as it is. *Taunton, J.* I suppose that in the great majority of instances no record is made up, and that where a writ of error is sued out, the officers of the inferior court put together the disjointed members which go to make up the record, and call it the *transcript*, although in fact it is the first record.] That is ordinarily the case.

But, assuming that the Court are of opinion that they can examine into the propriety of the amendment, there is no ground for making this rule absolute; for the amendment *was* authorized. The error in the record (if error it be, which may well be doubted,) was the omission of a mere formal allegation. It was stated that the defendant was *indebted* within the jurisdiction, and that he *promised* within the jurisdiction to pay, but it is not formally stated that the money lent &c. was *lent* &c. "then and there." This is clearly, in contemplation of law, a misprision of the clerk of the court, who in former times actually did, and is still supposed to, take down in court the statements of the parties. *Waldock v. Cooper* (a), *Hanslip v. Coater* (b), *Do-*

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(a) 2 Wils. 16.

(b) 2 Lev. 87.

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*rington v. Sliper (a), Peacock v. Burrell (b), Caster v. Goddard (c).* [*F. Pollock*, *contra*, stated that his point was, that *no* court can make any alteration in the *pleadings* after verdict; or that at all events, an *inferior* court cannot do so.] In *Bacon's Abridgment*, Amendment, G (*d*), it is thus laid down: "The inferior court, when the record is returned, whether it be by the Common Pleas or another court of record, may amend *after judgment as well after as before a writ of error brought*; and the rule of such amendment is to be certified by the clerk of such inferior court to the superior; for though the record is *removed* by writ of error, and a mittimus recordum is entered on the roll, yet the writ of error is to send the record in the state and condition *in which it ought to be by law*, and that is, *corrected from all misprisions of clerks*." Lord Chief Baron *Gilbert*, in his History of the Practice of the C. B. (*e*), says, that the stat. 21 *Jac.* 1, and all anterior statutes relating to amendments and jeofails, apply only to the superior courts at Westminster, whereas all subsequent to 21 *Jac.* 1 extend to *all* courts of record. The language, however, of 21 *Jac.* 1 is even more comprehensive than that of some of the subsequent statutes; for it says "any court of record." *Williams v. Lord Bagot (f), Doe v. Dyball (g), Carter v. Goddard (h), Vita v. Vita (i).* In the recent case of *Rex v. Carlile (k)*, the Court, after error brought, suggested that an application for an amendment of the record of a conviction might be made at the Old Bailey.

The omission of these words even in the record before the Court, would not *now* be considered as error.

(a) 1 Keb. 439.

(b) Ibid. 500.

(c) Cro. El. 79.

(d) 1 Bac. Abr. 5th and 6th ed. 168; citing Cru. El. 435, 459, (*qu. Corbyson v. Pearson*, Cro. El. 458,) 677; 2 Roll. Rep. 471; 8 Co. Rep. 162; Sir Fra. Moore, 407; Hob.

327; Hutt. 41; 1 Roll. Abr. 209, 210; 1 Salk. 49; T. Jones, 211.

(e) Page 112.

(f) 4 Dowl. &amp; Ryl. 315.

(g) 1 Moore &amp; Payne, 330.

(h) Cro. El. 79.

(i) Ibid. 435.

(k) 2 Barn. &amp; Adol. 971.

*F. Pollock and Martin*, contra. The omission in the record as it originally stood was a fatal error. In a note to *Peacock v. Bell* (a), it is said that in actions in inferior courts, every part of that which is the gist and substance must appear to be *within the jurisdiction*; therefore the *consideration* of the promise must be laid within the jurisdiction; and the omission of it is error.

No court has power to amend the *pleadings* after verdict. In *Com. Dig. (b)*, it is laid down that "no amendment shall be after verdict, where the amendment alters the issue tried or subjects the jury to an attain." The jury have in this case found that the money was lent by the plaintiff to the defendant, but they have not found that the money was lent *within the jurisdiction*. They have found the issue raised by the pleadings in the affirmative for the plaintiff; and it is no part of the issue whether the money was lent within the jurisdiction. Therefore to alter the declaration, by inserting the words "then and there," would be to *falsify* the record, by making the finding of the jury appear to be what it was not in fact.

The court below, at all events, could not make this amendment, because the statutes of amendments do not apply to inferior courts. *Mellish v. Richardson* has nothing to do with the statute of amendments, because there was no question as to an amendment *in the pleadings*. There was in that case a mere question of fact, which was, whether the verdict was upon one count or four. So, in the case as to the certificate of the judge. The error here is not a mere misprision of the clerk; *Green v. Miller* (c); which also shews that, after error brought, the court below cannot amend, except in respect of the misprision of a clerk.

It is said that the Court is bound by the record *as it comes up*. The record which by law *ought* to come up to this Court, is the record such as it was when the writ of error was allowed, or a transcript of such record: that is

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Second point.

(a) 1 Wms. Saund. 74 a.

(c) 2 Barn. &amp; Adol. 781.

(b) Amendment, (Z.)

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the record by which the Court are bound. It is sworn in one of the affidavits that the amendment was made *before* final judgment. It is believed that such was not the case. It is difficult to say what is *final judgment*; but it seems to consist in the taxing of the costs and the entering of the incipitur on the roll. [Taunton, J. I have always understood that there was final judgment when the costs were taxed, and an entry made in the margin of the roll to affect real estates.] The amendment was here *after* the taxation of costs.

LORD DENMAN, C. J.—Assuming that the record was erroneous as it stood when the writ of error was allowed, and that The Weekly Court of Requests at Poole had no power to make the alteration which was made here, still I think we cannot interfere. We have no power, I think, to alter the *transcript*, which, in contemplation of law, is *the record*. The court below having sent the record in the amended form, *we* have no power to amend. The rule for amending the transcript must therefore be discharged, though without costs. The other rule must be discharged with costs.

LITLEDALE, J.—I am of the same opinion. In point of law *this* is the record. The court below having certified this record, we are bound by it, and have no power to amend. This is an application to amend the record of another court, and merely upon affidavits.

TAUNTON, J., concurred.

WILLIAMS, J.—I am of the same opinion. It appears to me that the Court has nothing to amend by.

Rule for amending transcript discharged  
without costs.

Rule for quashing writ of error dis-  
charged with costs.

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## The KING v. ROOM.

*M. D. HILL*, in Hilary term, obtained a rule calling upon *W. D. Brownell* to shew cause why an attachment should not issue against him for his contempt in not attending to give evidence, before the grand jury of Warwickshire, against *F. Room*, upon a bill of indictment for certain misdemeanors, pursuant to a writ of subpoena served upon him. This rule was obtained upon an affidavit setting out and verifying the signature of the clerk of the peace to an order of the Quarter Sessions for Warwickshire, made on the 14th October, 1833, commanding him to certify to the Court of King's Bench the default of *Brownell*, and also setting out and verifying the signature of the clerk of the peace to his certificate, made at the same sessions upon such order, and which stated as follows:—

This Court has no power to grant an attachment against a witness for disobeying a subpoena issued out of the Court of Quarter Sessions.

It was proved to the satisfaction of the court, upon affidavits, that a bill of indictment had been preferred against *F. Room* for misdemeanors, and that *W. D. Brownell*, the keeper of the prison at Aston, near Birmingham, was a material and necessary witness for the prosecution; and it was further proved that a subpoena, commanding *Brownell* to appear at the said sessions, and to give such evidence as he knew before the grand jury, upon the indictment touching the misdemeanors, had been duly served upon him; that he did attend in court in pursuance thereof, and was duly sworn, and was called upon to give such evidence before the grand jury, but that he refused to attend the grand jury, and forthwith quitted the town without leave of the court; that in consequence of his absence and departure, no evidence was or could be tendered to the grand jury, and that in consequence thereof the bill of indictment was ignored and thrown out.

*Brownell*, in his affidavit in answer, denied that in consequence of his absence and departure no evidence could have been tendered to the grand jury, or that in conse-

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quence of his not attending and giving evidence the bill was ignored and thrown out, for he said that he could not have given any evidence whatsoever to the grand jury on the said bill of indictment, touching the offence therein charged, for he knew not of his own knowledge, or from the defendant, any thing of the offence, or of any fact or circumstance connected with it: that having finished all his business at the sessions when he was served with the subpoena, and having important business of his own requiring his presence at home, and no tender of any sum of money (save the sum of one shilling) having been made to him when served with the subpoena, or at any time before or since, to cover his expenses in remaining at the sessions, and being under no recognizance to give evidence on the said indictment, he therefore, and not through contempt, but solely because he thought that as he was under no recognizance,—as his expenses were not tendered with the subpoena,—and as he could have given no legal evidence whatsoever on the indictment had he been examined by the grand jury, he was not obliged to pay any obedience to the said subpoena, and therefore he left the sessions and returned home.

*Dundas* now shewed cause. The question raised by these affidavits is, whether the Court of King's Bench can attach a person who has disobeyed a subpoena issuing out of the Court of the Quarter Sessions of the Peace. Assuming that a sufficient sum of money was tendered to the witness for expenses, this Court has no such power of attachment, either by statute or at common law. The 45 Geo. 3, c. 92, may probably be relied on by the prosecutor. The title of that act is as follows: "An Act to amend two Acts of the thirteenth and forty-fourth years of his present majesty, for the more effectual execution of the criminal laws, and more easy apprehending and bringing to trial offenders *escaping from one part of the united kingdom to the other, and from one county to another.*" This

statute, and the statutes which it recites, were made to compel persons resident in England to obey the process of the courts of Scotland and Ireland, and to compel persons resident in Scotland and Ireland to obey the process of the English courts. The third section (a) shews plainly that this was the object of the act.

The 13 *Geo. 3*, c. 31, and the 44 *Geo. 3*, c. 92, lead more clearly, if possible, to the inference that this would be the object of the 45 *Geo. 3*, c. 92. The former of these statutes was passed before the Union with Ireland, and is intituled "An Act for the more effectual execution of the criminal law in the two parts of the United Kingdom." Various provisions are inserted in this act to accomplish the object stated in the title of the act. Subsequently to the passing of this statute, the Union with Ireland took place; and the 44 *Geo. 3*, c. 92, extended the provisions of the 13 *Geo. 3* to that country.

This Court has no power at common law to punish a contempt to the Court of Quarter Sessions. That court has ample authority to punish for contempt (b) to itself.

*M. D. Hill*, in support of the rule. It will be extremely *inconvenient* if there is no power in this Court, either by the common law or by statute, to punish the witness for the contempt of which he has been guilty, and a subpoena issued from the Court of Quarter Sessions will be useless. In *Rex v. Ring* (c), the witness was served with the copy of a subpoena issued out of the Crown Office, requiring him to attend at the assizes, and this Court granted an attachment against him for not attending in obedience to the subpoena. This case establishes the proposition that the Court of King's Bench has the power of compelling the attendance of witnesses at *inferior* courts. It certainly shews that this Court would in this case grant an attachment, if the

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(a) *Post*, 729.

(c) 8 T. R. 585.

(b) *Rex v. Lord Preston*, 1 Salk. 278.



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no instance has been found in which this Court has enforced the attendance of a witness by attachment, in a case similar to this. I understand that before an attachment can be granted, there must be some disobedience either to a rule or to the process of *this* Court. If it is wished to enforce the attendance of a witness at the Quarter Sessions, the party should issue a subpoena from the crown office; and if the witness disobeys *that* subpoena, he may be proceeded against by attachment.

TAUNTON, J.—I inquired why it was not matter of attachment where the subpoena issued out of the Court of Quarter Sessions, as well as where it issued out of the Crown Office. The answer is, that in the one case there is a contempt of process issuing out of *this* Court, and in the other not.

WILLIAMS, J., concurred.

Rule discharged.

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The KING v. PASMAN and others.

In the case of an indictment removed into K. B. by certiorari, the Court has no power to order the payment of costs incurred *before* the removal.

A Rule had been obtained, calling on *Whatley* the prosecutor to shew cause why he should not pay to the defendants certain costs incurred by them in preparing for trial at the Clerkenwell sessions. From the affidavits filed when the rule was obtained, it appeared that a bill for a conspiracy by the defendants was found at the Middlesex sessions in November last: that the defendants gave to the prosecutor notice of trial for the 16th of January last: and that the prosecutor, before the opening of the Court on that day, lodged a certiorari with the clerk of the peace, whereby the proceedings were removed into this Court.

Sir *James Scarlett* now showed cause. The act which

ing the attendance of witnesses by attachment, by issuing a subpœna out of this Court. The 45 Geo. 3 is confined to persons residing in other parts of the United Kingdom. The preamble to the third section recites that it is fit to provide for the appearance of persons to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in every part of the United Kingdom. It then enacts, "That the service of every writ of subpœna or other process upon any person in any one of the parts of the United Kingdom, requiring the appearance of such person to answer or give evidence in any criminal prosecution in any other of the parts of the same, shall be as good and effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear: And in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for *the court out of which the same issued*, upon proof made of the service thereof to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, to the Court of King's Bench in England, in case such service was had in England; or in case such service was had in Scotland, to the Court of Justiciary in Scotland; or in case such service was had in Ireland, to the Court of King's Bench in Ireland; and the said last-mentioned courts respectively shall and may thereupon proceed against and punish the person for so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna or other process, *issued out of such last-mentioned courts respectively*." It is said that this recognises the power of this Court. I cannot say that I should hold that this Court possessed the power, upon the supposition that the statute inferred its existence.

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LITLEDAL, J.—With regard to the general practice,

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no instance has been found in which this Court has enforced the attendance of a witness by attachment, in a case similar to this. I understand that before an attachment can be granted, there must be some disobedience either to a rule or to the process of *this* Court. If it is wished to enforce the attendance of a witness at the Quarter Sessions, the party should issue a subpoena from the crown office; and if the witness disobeys *that* subpoena, he may be proceeded against by attachment.

TAUNTON, J.—I inquired why it was not matter of attachment where the subpoena issued out of the Court of Quarter Sessions, as well as where it issued out of the Crown Office. The answer is, that in the one case there is a contempt of process issuing out of *this* Court, and in the other not.

WILLIAMS, J., concurred.

Rule discharged.

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THE KING v. PAsMAN and others.

In the case of an indictment removed into K. B. by certiorari, the Court has no power to order the payment of costs incurred *before* the removal.

A Rule had been obtained, calling on *Whatley* the prosecutor to shew cause why he should not pay to the defendants certain costs incurred by them in preparing for trial at the Clerkenwell sessions. From the affidavits filed when the rule was obtained, it appeared that a bill for a conspiracy by the defendants was found at the Middlesex sessions in November last: that the defendants gave to the prosecutor notice of trial for the 16th of January last: and that the prosecutor, before the opening of the Court on that day, lodged a certiorari with the clerk of the peace, whereby the proceedings were removed into this Court.

Sir *James Scarlett* now showed cause. The act which

regulates the issuing of a certiorari, requires the prosecutor either to prosecute or to pay the costs, that is, the costs incurred in *this Court*. The defendants say, that this Court has a power to award the costs of preparing for trial at the sessions. This Court has no authority except by statute, and no act gives this Court jurisdiction to award costs incurred *before* the removal of the record.

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*F. V. Lee*, in support of the rule. *Rex v. Lewis* (a) shews, that a certiorari does not issue at the instance of a prosecutor *as a matter of right*, and therefore the Court will not allow the prosecutor to make use of it vexatiously and oppressively. [Lord Denman, C. J. The payment of the costs incurred was not imposed upon the prosecutor when the certiorari was granted by this Court. Assuming that the prosecutor has been guilty of oppression, what jurisdiction has the Court to order the payment of these costs? *Taunton, J.* This is an application to us to allow costs incurred *elsewhere*.] *Jones v. Davies* (b) is a case in point. There a certiorari issued to remove a cause from the Court of Great Sessions in Wales. No special ground for the certiorari was shewn, nor was any notice of the application for the certiorari given to the opposite party. The certiorari was not lodged until the day before the trial would in course have taken place, and great expense had been incurred. The Court quashed the certiorari, and ordered the party obtaining it to pay the costs incurred by the opposite party in preparing for the trial. There can be no difference in this respect between a civil action and an indictment. In *Rex v. Bartrum* (c), an indictment for perjury was removed by certiorari into this Court. The prosecutor gave notice of trial, and on the day of trial withdrew the record. The Court ordered the prosecutor to pay the defendant the costs of preparing for the trial. Again, in *Rex v. Walton* (d), the costs of trial were allowed

(a) 4 Barr. 2456.

(c) 8 East, 209.

(b) 1 Barn. & Cressw. 143.

(d) 4 Carr. & Payne, 224.

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to the defendant, but in this case, as in *Rex v. Bartrum*, the costs allowed were certainly costs incurred *after* the certiorari had issued. [Lord *Denman*, C. J. In *Jones v. Davies*, the person who sued out the certiorari had done what he had *no* right to do. Here, the prosecutor has only done that which by law he *had* a right to do.] The Court may modify the rule, and direct the certiorari to be quashed unless these costs are paid.

LORD DENMAN, C. J.—The Court has no power to order these costs to be paid. *Jones v. Davies* is certainly not easy to be distinguished from the present case, and I am not certain that the distinction I suggest is correct. It is this—In *Jones v. Davies*, the certiorari ought not to have issued except on special grounds, and it was sued out without any ground being alleged;—the certiorari therefore issued improperly: but here, the prosecutor has done no more than by law he had a right to do. As the certiorari issued without condition, the Court cannot now impose terms. The Court cannot now modify the rule in the manner proposed. Another application must be made if the defendants wish to ask the Court to quash the certiorari.

LITLEDALE, J.—*Jones v. Davies* is not a case I should be disposed to follow. There, however, the certiorari issued improperly, as no ground was stated for removing the cause, and no notice was given to the defendant. Here, the certiorari issued regularly; and there is no reason therefore for making the prosecutor pay these costs, as he has proceeded with perfect regularity. I do not see how this Court can have any power over the costs incurred *before* the certiorari issues.

TAUNTON, J.—This Court has, in my opinion, no jurisdiction to interfere with the proceedings in the Court below. In *Jones v. Davies*, I addressed that argument to the Court. I believe the Court, in that case, made the rule absolute from the exuberance of virtuous indignation

against the improper practice which had prevailed in the Court of Great Sessions.

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WILLIAMS, J.—The prosecutor having obtained the certiorari without terms, I cannot see upon what ground we can now impose terms upon him.

Sir *James Scarlett* applied for costs.

Lord DENMAN, C. J.—We have no discretion.

Rule discharged, with costs.

THE KING v. ELMY and SAWYER.

THE defendants, who were brought up by habeas corpus, had been convicted of an offence under 3 & 4 Will. 4, c. 53, intituled "An act for the prevention of smuggling," and committed by two magistrates to the county gaol at Ipswich.

The gaoler returned that he received the prisoners on the 18th of May last, by virtue of two certain warrants of commitment (which he set out) under the hands and seals of *F. R.* and *J. W.*, two justices of the peace for the borough of Dunwich, which stated the conviction of the prisoners; and that he detained the prisoners under these warrants until the 22d of May last: that on that day, some person in his absence came to the gaol,—obtained possession of, and carried away the said warrants,—and left at the gaol in lieu thereof two other warrants (which were also set out,) which were dated on the same 18th May, and were warrant, and left in lieu thereof another warrant, dated the same day, under the hands and seals of the same justices, but which contained no statement of its being a substituted warrant; and that under this warrant he had since detained the prisoner: Held, that it did not sufficiently appear that the second warrant was substituted by the authority of the justices, and that the prisoner was therefore entitled to be discharged.

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under the hands and seals of the justices who had signed the former warrants of commitment. Under these latter warrants he certified that the prisoners were then detained. By section 90 of the above act, justices of the peace are authorized and required to amend any information, conviction, or warrant of commitment, for any offence under any act for the prevention of smuggling or relating to the customs, at any time, whether before or after conviction.

First point :  
 The second  
 warrants sub-  
 stituted for the  
 first.

*Campbell, A. G., and Dundas, for the Crown.* It may be admitted that the first warrants are informal ; but the prisoners are detained under the second warrants of commitment, which are perfectly valid. [Lord *Denman*, C. J. How does it appear that the justices have amended the first warrants of commitment ?] The second warrants of commitment are under the hands and seals of the justices who are parties to the first. The gaoler is required by the writ of habeas corpus to produce the prisoners and state the cause of their detention. He states, that the second warrants of commitment are those by virtue of which the prisoners are detained. The simple question therefore is, whether the second warrants of commitment are valid. [Taunton, J. The objection is, that it does not sufficiently appear in point of fact that the magistrates intended to amend the first warrants of commitment, and that they authorized the substitution of the second warrants of commitment for the first. The gaoler might have returned that as a matter of fact.] Both the first and second warrants of commitment are set out. They bear the same date, and are under the hands and seals of the same justices, who, instead of interlining the first, substitute the second. Can it be said that a warrant of commitment can only be amended by making an interlineation on the piece of paper on which the warrant of commitment is written ? [Lord *Denman*, C. J. The second warrants of commitment might have recited that they were substituted for the first.] Where leave is given to amend a declaration, the amendment is not

made by interlining the amended declaration, but by delivering a new one (a).

In *Rex v. Taylor* (b) it was held, that if a warrant of commitment in execution, manifestly defective on the face of it, shews that there has been a conviction, the Court will not notice the defect until the conviction is returned into Court. It appears in this case, that there has been a conviction which the Court will not intend to be invalid.

The Court, therefore, will not discharge the defendants for want of form in the commitment, if the conviction be good. In *Rex v. Taylor*, it was said by Bayley, J., "There is an old case in *Fortescue* which decides this, that if there is a conviction independently of the commitment, the Court will not discharge on any defect in the warrant of commitment, unless the conviction is before them." On referring to *Fortescue* (c), it appears that the case was this. On a return to a habeas corpus, which stated that the defendant had been convicted of carrying away deer in a forest, it was objected that the word "unlawfully" was omitted. Parker, C. J. said, "there is a difference in the return of a habeas corpus where it is before conviction and after; for where it is after, you need not be so particular. It ought to be alleged 'unlawfully' if before conviction; but in this case, it may be in the conviction, so that it will be well enough." In *Rex v. Taylor*, the Court waited until the conviction was returned, and then discharged the party. *Rex v. Rogers* (d) is to the same effect as *Rex v. Taylor*. [Littledale, J. There is still this objection, that the party is admitted not to be any longer in custody under the first warrant, and it does not appear that he is in custody under the second warrant; since it does not appear who took away the first warrant and brought the second. The prisoner is brought to the gaoler with the first warrant.] The second warrant is substituted for the former one, and it cannot be necessary

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Second point:  
Though war-  
rants bad, con-  
viction good.

First point.

(a) *Quere.*

(b) 7 Dowl. & Ryl. 622.

(c) *Rex v. Hawkins*, Fortes. 272.

(d) 1 Dowl. & Ryl. 156.



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that the justices should come to the gaol and do this in person. *Rex v. Allen (a)*, and *Rex v. Barker (b)*, also establish, that where there is a valid conviction, the Court will not discharge a prisoner on account of an informality in the warrant of commitment.

*Platt and Palmer*, for the prisoners. The Court will not intend any fact which is not expressly stated in the return to the habeas corpus. There is nothing apparent on the return to shew which are the original warrants of commitment, and which are the amended warrants. The return professes to detain the parties on the second warrants of commitment, but for anything that appears to the contrary, both the parties and the offences mentioned in the second warrants may be different from those named in the first. The gaoler was not charged with the prisoners under the *second* warrant. Where a party is illegally arrested on a Sunday, and on the Monday a detainer is lodged against him, it is the practice of the Court to set the party at liberty.

*Campbell, A. G.*, in reply. It is desirable that the course proper to be pursued where an amended order is intended to be substituted should be well ascertained. It cannot be said that the justices did not authorize the substitution, as it appears that they signed and sealed the second warrants. It was not necessary that the gaoler should be charged with the prisoners under the second warrants, for a substituted warrant is a continuation of the other.

Lord DENMAN, C. J.—I agree with much that has been urged for the crown, but still I am of opinion this is not a good detainer. It is said that the statute gives the justices power to amend the warrant of commitment, and that the committing magistrates having discovered an error in the first warrants of commitment, proceeded to amend it. This

(a) 15 East, 333.

(b) 1 East, 186.

they have undoubtedly a perfect right to do, but it ought to appear clearly that they *have* done so. The amendment by the magistrates may be made either by altering the first warrants of commitment with their own hands, or by alluding to the first warrants of commitment in the second. In restraining the liberty of the subject, it ought to be shewn that everything has been done with perfect regularity. That not being the case here, the prisoners are entitled to be discharged.

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LITLEDALE, J.—It appears from the return to the habeas corpus that there were two warrants of commitment for each prisoner. The first warrants and the prisoners came together to the gaoler. They were, therefore, properly in custody under these warrants. The justices, by the act, have the power to amend the warrant of commitment. This, it is said, they did. But that fact, I think, does not sufficiently appear. Although the hands and seals of the justices are subscribed and affixed to the second warrants of commitment, it is not shewn that they found their way to the gaoler with the sanction and by the authority of the justices. Nor, therefore, does it appear that the prisoners were detained or charged under the second warrants of commitment by the authority of the justices. I do not mean to say that it is necessary for the justices to go to the gaol and strike out what they wish to amend with a pen, but if they chose not to go to the gaol, they ought to have sent an intimation to the gaoler that the second warrants were sent by their authority. If they had sent a letter under their hands stating that the second warrants of commitment were substituted by them for the first, the production of that letter would have shewn that the substitution was made by the authority of the justices. It does not appear that any such intimation was given, and therefore the prisoners must be discharged.

TAUNTON, J.—I am also of opinion, that the prisoners

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are entitled to be discharged. *Primâ facie*, the warrant under which the party is *received* is the warrant of *detainer*. The second warrant, in order that it may supersede the first, ought to be fully shewn to be an act of the justices. It would be a *petitio principii* to say that the second warrant amends the first, unless it is first shown that the second was sent by the authority of the justices. It does not appear that the second warrant was sealed by the justices. It does not appear that the second warrant was an amendment of the first. It does not appear that they authorized the one in lieu of the other. The words "in lieu" are used in the return, but it may have been left by persons who had *no authority* from the magistrates. The fact may be, and is, that the prisoners were detained under the second warrant; but the question is, whether that detainer is lawful. That second detention could not be legal, unless it was authorized by the magistrates; and, for anything that appears, it was wholly *unauthorized* by them. It is, however, said, that if a proper *conviction* has taken place, and appears upon the warrant of commitment, the prisoners are not entitled to be discharged, although the warrant itself is bad. I answer, that we have not the conviction before us *as a separate instrument*. I have a recollection of a case where it appeared that a party had been convicted under one statute, and was committed under another in *pari materiâ*. It was held by the Court, that the one would not help the other. The Court considered the conviction one thing and the commitment another. It appears to me, therefore, that the prisoners are entitled to be discharged. There could be no difficulty, in shewing that the second warrant was made and substituted by authority of the justices, if that were the case.

WILLIAMS, J.—I am of the same opinion. I do not see how the Court can look at the second warrants. If they were not substituted by the authority of the justices, we ought not to look at them. There is no intimation in the

return that the first warrants were withdrawn and the second substituted by the magistrates. Both bear the same date. I do not even see what there is to shew that those stated to be amended *were* the second warrants.

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Lord DENMAN, C. J.—My judgment proceeds entirely on the ground that the one warrant is not *substituted* for the other *by the authority of the magistrates*.

The prisoners were discharged.

DODD and another v. HOLME and another.

**CASE.** The first count of the declaration stated, that the plaintiff was possessed of an ancient dwelling-house, wherein he carried on the business of a lodging-house keeper, and that the defendants were employed in digging the foundations of an intended building in a piece of land next adjoining to the land whereon the dwelling-house was built, yet the defendants so carelessly dug such foundations, that by reason thereof the foundations and walls of the said dwelling-house sunk and gave way, and it became uninhabitable. The declaration, which contained four other counts, concluded with a statement of special damage. At the trial before *Bolland, B.*, at the Lancaster summer assizes, 1833, it appeared that the dwelling-house of the plaintiff, which had been built more than twenty years, adjoined upon a warehouse belonging to one *Birkett*. The defendants were employed by *Birkett* to pull down and rebuild the warehouse on his land. The defendants pulled down the warehouse and dug a foundation at the extremity of *Birkett's* land, in consequence of which the plaintiff's dwelling-house, which was very old, gave way. Evidence was given that the faulty state of the dwelling-house occasioned its fall. It was not known when the house or the warehouse, which was pulled down, was built. The learned baron told

An action lies against a party who by carelessness or negligence in excavating his own ground, either causes or accelerates the fall of an adjoining house.

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the jury that the plaintiff was entitled to recover, provided they were of opinion that the fall of the plaintiff's dwelling-house was occasioned by what the defendant had done. The jury found a verdict for the plaintiffs; and leave was given to the defendants to move to enter a nonsuit, in case the learned judge had misdirected the jury. In Michaelmas term last, *F. Pollock* obtained a rule nisi for a nonsuit or a new trial, on the grounds that it should have been left to the jury, whether the plaintiff's house was properly built, considering that it stood on the extremity of his own land,—and that the verdict was against the weight of evidence.

Blackburne and *Roscoe* now shewed cause. It was not a proper question to leave to the jury, whether, under all the circumstances, the plaintiff's ancient house was built in a proper manner. That would have been an issue different from and irrelevant to that raised by these pleadings. In *Wyatt v. Harrison* (a), cited for the defendant at the trial, it was decided that the possessor of a modern house cannot maintain an action against the owner of the adjoining land, for digging in his own land, so that the house falls in. The whole question was, whether the house was ancient or modern. Besides, there was no allegation that the defendant had acted carelessly. In *Peyton v. The Mayor of London* (b), which was an action by the owner of the adjoining house, for taking down an old partition wall, there was no opportunity to shore up the house; and the Court therefore held that it was the duty of the owner of the house to secure it internally. The defendants in this case did shore up the plaintiff's house, but did it so inefficiently that the house fell. [*Taunton, J.* In *Wyatt v. Harrison* there is cited a very important position from *Rolle's Abridgment*, which was the corner stone of that decision. What was the antiquity of this house?] Very great. One of

(a) 3 Barn. & Adol. 871.

The Governors of Christ's Hospital,

(b) 9 Barn. & Cressw. 725;

4 Mann. & Ryl. 625.

and see S.C. per *uomen Peyton v.*

the arguments used at the trial was, that the house was old and crazy. The first case in which a distinction is made between an ancient house and a modern one, is in *Palmer v. Fleshees* (a). There is also a case in *Selwyn's Nisi Prius* (b). In *Walters and others v. Pfeil* (c), which was an action similar to the present, Lord Tenterden, C. J., after saying that the owner of the house injured ought to have shored it up internally, thus continued:—"Still, the omission does not necessarily defeat the action; if the pulling down be irregularly and improperly done, and the injury is produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought for his own protection." It is a maxim of the law, and is laid down in *Turbervil v. Stamp* (d), that "every man must use his own so as not to hurt another." In *Smith v. Martin* (e), which was similar to this case, no inquiry was made whether the house injured was properly built. [Lord Denman, C. J. You do not know that when the house was built it was erected at the extremity of the owner's land.] That did not appear. In *Brown v. Windsor* (f), the plaintiff's house had been by permission built against the pine end wall of the defendant. Twenty years subsequently the defendant made an excavation in his own land, in a careless and unskilful manner, by which the wall and consequently the house was injured. The Court of Exchequer held that the action was maintainable; and it never occurred to any one to agitate the question, whether the house damaged was properly or improperly built, but the questions were, whether the licence to build against the wall could be *revoked*, and whether he could make use of his own property in any way he pleased. That case came to the same question as this, for by user for a length of time a grant is to be presumed. [Lord Denman, C. J. User for a length of time of a man's own land, raises no presump-

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(a) 1 Siderf. 167.

(d) 1 Salk. 13.

(b) 1 Selw. N. P. 8th ed. 444,

(e) 2 Saund. 394, 6.

Stansel v. John.

(f) 1 Crompt. & Jerv. 20.

(c) 1 M. & Mal. 362.

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tion.] *Shugsby v. Barnard* (a), *Roberts v. Read* (b), *Sutton v. Clarke* (c), and *Jones v. Bird* (d), shew that the question which arises in cases of this description, is, whether the party making an alteration in his own property has exercised such precaution and care as to prevent his neighbour's property from being injured. In the absence of authority, the reasonable rule is, that the person executing the work should take due care and precaution that he does not damage the adjoining property by that work. In *Jones v. Bird* (e), which was an action for negligently repairing sewers, whereby certain houses near to them were damaged, *Bayley, J.* said, that it was not enough to shew that the defendants had exercised all their own skill and caution, and that they had been guilty of negligence in not having attended to the suggestions of others, who recommended the precaution of shoring up the chimneys. [*Littledale, J.* referred to *Viner's Abridgment*, Trespass, (I. a.) (f), and *Comyns's Digest*, Action on the Case, Nuisance, (C.)]

*F. Pollock* and *Wightman*, in support of the rule. After the report of the learned judge, the rule, so far as relates to a nonsuit, must be abandoned. Then with respect to a new trial, it should have been left to the jury, whether the house was originally built in such a manner and in such a position as it ought to have been, with respect to the adjoining land. There is no doubt that the plaintiff's house was propped up by the defendant's warehouse, and if the taking down the warehouse placed the plaintiff's house in danger, it was the plaintiff's business to take measures to prevent its fall. With respect to lights, no man can complain, that after he has permitted a window to remain for twenty years, a jury are to presume a grant. The reason why a grant is presumed is, that each particular act is taken to be permitted. But no means can be taken to prevent a person building in

(a) 1 Rolle's Rep. 430.

(b) 16 East, 215.

(c) 6 Taunt. 29.

(d) 5 Barn. & Alders. 857.

(e) 1 Dowl. & Ryl. 497.

(f) 20 Vin. Abr. 514.

an insufficient manner at the extremity of his land, near an adjoining building. It is said that the plaintiff's is an ancient house, and that there is a distinction between the case where the house damaged is modern or ancient. It has been forgotten that the defendant's warehouse is as old as the plaintiff's house. The case is the same as if the defendants, by excavating their own land, had injured a house recently built. *Wyatt v. Harrison* therefore applies. There Lord *Tenterden* says (a), "It may be true, that if any land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an *additional* weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." Then there was no evidence of any negligence on the part of the defendants, except that they did not shore up the house of the plaintiff. But *Peyton v. The Lord Mayor &c. of London*, shews that it was not incumbent on the defendants to shore up the plaintiff's house. It was the business of the plaintiffs, not of the defendants.

LORD DENMAN, C. J.—This is a case involving some curious points of law. It is an action for carelessly, negligently, unskilfully and improperly digging the foundations of a warehouse on the land next adjoining the land on which the plaintiff's dwelling-house was built, so that by reason thereof the foundations and walls of the plaintiff's dwelling-house sunk and gave way. The question is, whether it was proved at the trial, and left by the learned judge to the jury, that the foundations of the warehouse were carelessly and negligently dug by the defendants. That was the fit point to be submitted to the jury, because the occasion of the damage was the real question to be tried.

(a) 3 Barn. & Adol. 876.

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If the plaintiff's house was in so desperate a condition that it could not have stood if the excavation had not been made, the defendants could not be charged with the result. Much evidence was given, but substantially the question was, whether the defendants' act had caused the injury. The learned baron told the jury that the plaintiffs were entitled to recover, provided they were of opinion that the loss was occasioned by what the defendants had done, and reports to us that he borrowed the terms of the question submitted to the jury from *Wyatt v. Harrison*, of which this is the converse. The point of negligence was in substance left to the jury, and they could arrive at no other conclusion than they have done. A party has no right to *accelerate* the fall of his neighbour's house, although it may be in an insufficient state of repair. Without entering into the question as to the distinction in this respect, between a modern house and one which has been built twenty years, I am of opinion that the question has been fairly left to the jury, and that they have come to a right conclusion.

LITLEDAL, J.—The plaintiff's house had been built for upwards of twenty years, and was an ancient house. What difference this makes, I will not take upon myself to determine in the present case. But the plaintiff has acquired certain rights upon his own land. The learned baron, as appears from his report, has taken the law from *Wyatt v. Harrison*. He did not leave the question to the jury as to the state of the plaintiff's house, but no doubt that was pressed upon their attention. The question of negligence was certainly before them, and there is no sufficient ground for disturbing the verdict.

TAUNTON, J.—This cause at the trial involved a mere question of fact to be decided by the jury. I am at a loss to see that the conclusion which the jury have come to is wrong. This cause occupied a considerable length of time, and from what I heard read from the learned baron's

note of the proceedings at the trial, it is clear that there was an inquiry as to whether the act was done by the defendants negligently. The jury have drawn the conclusion that the act *was* done negligently. In every count of the declaration there is an allegation of carelessness and negligence on the part of the defendants. The jury have decided not only that there was negligence, but that by reason of the negligence on the part of the defendants, the damage was sustained by the plaintiffs. It is said that the house was so ruinous, that peradventure it would not have stood six months. The defendants have no right to accelerate the fall of the house six months. If the house, from its condition, was likely to come down—if in truth it did come down from that cause, the damage has not been sustained by the negligence of the defendants. There was ample evidence to support the conclusion at which the jury arrived. With respect to the summing up, the learned baron gives a very brief account of it. But it is utterly impossible that the jury could have passed-by the point, whether or not the defendant had done the act negligently or used proper precaution; and I think we ought not to examine the direction of the learned judge with eagles' eyes. As damage therefore arose from the negligent conduct of the defendants, the rule should be discharged.

WILLIAMS, J.—It appears clearly from the report of the learned judge that the attention of the jury was drawn to the question as to what was the cause of the fall of the plaintiff's house; for much evidence was given with a view to shew that it was the faulty state of the house which occasioned its giving way. That must have been brought to the attention of the jury as well as the question of negligence. If the house was good only for six months, a right of action would vest in the plaintiff for accelerating its fall before the expiration of the six months. If it be true that the house was frail, then there was a greater necessity for care and attention on the part of the defendant in ap-

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proaching it. As to the negligence of the defendants, the jury have come to a right conclusion, considering the evidence on the one side and the other. Therefore the verdict ought not to be set aside.

Rule discharged.

DOE, on the several demises of JOHN SMITH and HELE WEBBER PAYNE, v. SIMON WEBBER.

In ejectment against *A.* on the demise of *B.*, a mortgagee, a recovery in a former ejectment, brought subsequently to the mortgage, on the demise of *A.*, against *C.* the mortgagor, is inadmissible in evidence for the defendant.

So, although on the first occasion *B.* was examined as a witness on behalf of *C.*

So, although the second action is brought on the several demises of *B.* and *C.*, if the plaintiff elects to rely on the demise of *B.* only.

EJECTMENT for ten acres of land in the parish of North Tawton, Devon. At the trial before *Bosanquet, J.*, at the Exeter spring assizes, 1884, it was contended that the plaintiff was entitled to recover as lessee of *John Smith*, under the following circumstances:

The plaintiff proved that from 1789 to 1828 *John Payne*, and *Hele Webber Payne*, his son, had been successively in possession of the land; that they had leased and mortgaged this property, and had in various other ways dealt with it as owners of the fee; and that in 1815 the latter had conveyed the fee to *Smith* by way of mortgage.

The defendant set up the following case:

1787. *Simon Webber*, the grandfather of *Hele W. Payne*, devised the land to his son, *Simon Webber*, the father of the defendant, for life; remainder to the defendant in tail male.

1790. *John Payne*, the father of *Hele Webber Payne*, took possession of the land upon the death of *Simon Webber*, the grandfather.

1817. *Simon Webber*, the father, died, without having taken any steps to gain possession under the will.

1825. An ejectment on the demise of the present defendant, was commenced against *H. W. Payne*, and was ultimately referred to a barrister, who awarded in favour of the then lessor of the plaintiff. A writ of hab. fac. possessionem was executed on the 29th March, 1828; and the present defendant has since continued in the pos-

session. The lessor of the plaintiff, *John Smith*, attended one of the meetings before the arbitrator as a witness. It was objected by the counsel for the plaintiff, that this evidence was not admissible as against *John Smith*. The learned judge held that the evidence was admissible if the plaintiff relied on *both* the demises in the declaration, but inadmissible if he relied only on the demise by *John Smith*. The jury found a verdict for the plaintiff, as lessee of *John Smith*.

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Erle, in Easter term last, moved for a new trial. The evidence was improperly rejected. The question was, which of the parties was a wrong-doer. The evidence tendered was therefore admissible to shew in what way the defendant had obtained possession of the land. The possession, as against the defendant, was not adverse until 1817. The mortgagor held the land by the permission of the mortgagee. Acts therefore adverse to the title of the one, must be considered as adverse to that of the other. *Smith*, the mortgagee, was present at the arbitration; he had consequently notice of the action and of the title being in dispute. The mortgagor must be considered as his agent, since he holds possession by his permission; and *Doe d. Morris v. Rosser (a)* decided that where the right to land is referred to an arbitrator, who has awarded in favour of the lessor, the award concludes the defendant from disputing the lessor's title in another ejectment. *Doe d. Harding v. Cooke (b)*, which was cited for the plaintiff at the trial, is distinguishable from the present case. There the plaintiff shewed twenty years' possession, and the defendant proved that he himself had been in possession for ten years following the twenty. The Court of C. P. held that the plaintiff was entitled to recover. There no other facts appeared except the duration of each party's possession, and the plaintiff had had possession for more than twenty years. Besides, it was never previously decided that twenty years' possession, unaccompanied by any other

(a) 3 East, 15.

(b) 5 Moore & P. 181; 7 Bingh. 346.

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circumstance, afforded a presumption of title against a defendant who had been *subsequently* in possession. [*Parke, J.* Twenty years' possession is *prima facie* evidence of title.] Here, neither party was in possession for twenty years. The evidence was admissible to shew that the defendant, (who was the last in possession,) held that possession under circumstances which raised a probability of title.

By the COURT.—There is no ground whatever for saying that this was evidence against *Smith*. It is true he was aware that the arbitration was going on, and was present at one meeting; but he was not bound to interfere. The arbitration was *res inter alios acta*.

Rule refused (*a*.)

(*a*) And see *Doe dem. Foster v. The Earl of Derby, post, 782.*

#### BYWATER v. RICHARDSON.

A horse is sold with a warranty of soundness for twenty-four hours:—Held, that the mere knowledge of unsoundness by the seller does not vitiate the sale.

Certain rules were pasted up at a repository for horses, regulating sales by private contract there:—Held, that parties contracting at the repository having notice of the rules, impliedly adopted the terms of the rules.

CASE on the warranty of a horse. The declaration alleged in one count that the horse had been warranted sound and steady in harness, and in the other counts a warranty of soundness, but the breach in all the counts was only that the horse was *unsound*. On the trial before *Bolland, B.*, at the Lancaster summer assizes, 1833, it appeared as follows:

The horse had been sold by the defendant to the plaintiff in April, 1832, at a repository for horses in Liverpool, with a written warranty that he was "sound and steady in harness." The plaintiff resold him at the same repository to one *Yeoman*, shortly afterwards, with a warranty of soundness. In June, 1832, *Yeoman* returned the horse to the plaintiff as unsound, and commenced an action to recover the purchase money. *Bywater* at first defended and afterwards compounded that action, and took back the horse on discovering (a fact which was proved upon *this* trial) that it had for some

impliedly adopted the terms of the rules.

months had a navicular disease, which was explained by veterinary surgeons to consist in inflammation in a joint within the inside of the hoof, and to be of such a nature that it may be so far alleviated by proper treatment as to render a horse fit for gentle work, and make him appear sound on soft ground, but to be rarely, if ever, permanently cured, so as to make him fit for hard work. The plaintiff then applied to the defendant to take back the horse and reimburse his expenses; and on his refusal so to do, the horse was resold at a considerable loss. This action was brought to recover the difference of price, and also the expenses of the action brought against the plaintiff by *Yeoman*.

The unsoundness of the horse was not denied at the trial. It also appeared that horses sold at the repository were shown upon a riding-place covered with bark, and not calculated to disclose lameness. Some evidence was given with a view to shew that the defendant must have known of the unsoundness at the time of the sale, and had used artifice to conceal the horse's defects. On the part of the defendant, the conditions for sales by private contract at the repository were relied on. One of these stated that a warranty of soundness given at the repository would remain in force only until 12 at noon of the next day after the day of sale, when the sale would become complete, and the responsibility of the seller would terminate, unless in the meantime a notice to the contrary was sent. These conditions were painted on a board fixed to the wall of the repository, and were known of by both the plaintiff and the defendant, but no reference had been made to them by the parties at the time of the sale.

In addition to the *unsoundness*, several witnesses spoke to the horse being *unsteady in harness*.

The learned judge, in his charge to the jury, stated that such conditions could apply only in cases where they are referred to at the time and coupled with the act of sale, as in sales by auction, when the conditions are read, but not in such a case as this; and that if the jury thought the

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horse unsound, the defendant was clearly liable upon his warranty. The jury found a verdict for the plaintiff for the difference of price on the resale. The learned judge gave the defendant leave to move to enter a nonsuit. *Alexander*, for the defendant, obtained a rule nisi accordingly.

First point:  
 Unsteadiness  
 in harness.

*F. Pollock* and *G. W. Hope* shewed cause. I. Whatever might be the effect of the condition relied on, as to *unsoundness*, it clearly could not protect the defendant from the consequences of the *unsteadiness*. *Buchanan v. Parnshaw* (a) is precisely analogous. There the horse was sold at a public auction, warranted six years' old and sound. One of the conditions of sale was, that he should be deemed sound unless returned in two days. The Court held that this condition applied only to the warranty of soundness.

Second point:  
 Whether contract subject  
 to condition.

II. There was no sufficient evidence of a contract subject to the condition, there having been no reference to it at the time of the sale, as in *Mesnard v. Aldridge* (b). This case is similar to those where notices, limiting their responsibility, have been given by carriers, which notices it has been decided, by *Kerr v. Willan* (c) and *Rowley v. Horne* (d), cannot be taken advantage of by the carriers, upon the mere proof of their having been *written up* in the offices or *advertised* in the newspapers.

Third point:  
 Fraud.

III. Supposing that this was a sale upon the condition contained in the rules, and that this rule applies to a case where *unsteadiness* is shewn, still there has been so much fraud on the part of the defendant that he ought not to be permitted to take advantage of the condition. Lord *Ellenborough*, in *Baglehole v. Walters* (e), (in which the doctrine in *Mellish v. Motteux* (f), that even on a sale with all faults the vendor was bound to discover such faults as are known to himself, was overruled,) gives as his reason, that a sale

(a) 2 T. R. 745.

(b) 3 Esp. N. P. C. 271.

(c) 6 Maule & Selw. 150,

(d) 3 Bingham. 2.

(e) 3 Campb. 154.

(f) Peake's N. P. C. 115.

with all faults puts a purchaser upon his guard. He, however, admitted even there, that if any *artifice* were used to conceal the faults, the sale would be vitiated. In *Schneider v. Heath* (a), *Mansfield*, C. J., expressed a decided opinion that even on a sale *with all faults*, a false representation would constitute a sufficient fraud to vitiate the transaction—a view which appears confirmed by *Polhill v. Walter* (b), the effect of which, according to *Parke*, J., in *Freeman v. Baker* (c), is, “that if a party states what he knows to be untrue, it is a fraud in law.” And in addition to these authorities, that in *Aldridge v. Mesner* (d), (which was a case on a bill of interpleader, under which the *action* in *Mesnard v. Aldridge* had been tried,) Lord *Eldon* expresses a decided opinion that conditions, such as are now relied on by the defendant, are of no avail, if it appear that the motive for selling under them is the impossibility of discovering the unsoundness within the time limited—a description precisely applicable to the present case, in which it appeared from the evidence that the defendant *must* have known of the unsoundness, and have adopted this way of selling on purpose to protect himself from the consequences.

Lastly, if it be objected that the purchaser might, by using extraordinary care, have discovered the fault, the answer is, as in *Schneider v. Heath*, that all that he was required to do was to exercise common prudence; and that he appears to have done.

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Fourth point:  
Degree of caution required  
in buyer.

*Alexander and Wightman*, for the defendant.

I. With respect to the warranty of steadiness in harness, First point. there is no complaint stated in the breach in the declaration that the horse was unsteady in harness. That, therefore, cannot be taken advantage of by the plaintiff.

II. There is no ground for saying that this was a contract apart from the rules of the repository. Each party

(a) 3 Campb. 506.

(c) *Ante*, vol. ii. 450.

(b) 8 Barn. & Adol. 114.

(d) 6 Ves. jun. 418.



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was perfectly familiar with the rules. The plaintiff set up these very rules as a defence to the action brought against him by *Yeoman*. *Mesnard v. Aldridge* is expressly in point. There the conditions of sale were contained in a printed paper, and posted up under the auctioneer's box, and at the time of sale the auctioneer announced that the conditions were *as usual*. Lord *Kenyon* held, that this was a sufficient notice of the conditions under which the horses were sold, and that the purchaser was bound by it. It is true that this is a sale by private contract, but the *principle* will equally apply. As the plaintiff was aware of the rules, he must be considered as having adopted them, and must be bound by them. This is a notice to the buyer that at the end of twenty-four hours the seller will not be answerable for the soundness of the horse. At the end of the twenty-four hours it was a sale without a warranty. Whether the defendant knew of the unsoundness, is immaterial. If a party purchases a horse with such a warranty, he must take the consequences.

Third point.

. III. It is said that this is a case of deceit; but this objection was not taken at the trial.

Lord DENMAN, C. J.—There is no doubt the plaintiff was aware of the rule. His situation is therefore the same as if the defendant had said to him by word of mouth, "I will not warrant this horse to you for a longer period than twenty-four hours." This the defendant was perfectly warranted in doing. It may be prudent to make such a condition of sale. *Baglehole v. Walters* is applicable. There, a ship was sold with all faults; and it was held that it was quite immaterial how many faults belonged to it *within the knowledge of the seller*, unless he used some artifice to prevent their discovery. Here, the horse is sold with all faults except such as shall be discovered within a limited period.

LITLEDALE, J.—I am of the same opinion. The de-

fendant did not intend to warrant the horse unless it was returned within twenty-four hours.

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TAUNTON, J., and WILLIAMS, J., concurred.

Rule absolute for a nonsuit.

The KING v. JOHN WILSON.

*M. D. HILL* had obtained a rule calling upon certain justices of the county of Leicester to shew cause why a mandamus should not issue requiring them to amend their return to a certiorari, by returning the *information* on which the conviction of a forcible detainer was founded, and also to set forth on the face of the conviction the *evidence* which was given touching the entry into the premises in the conviction mentioned.

In a conviction for a forcible detainer, under 8 H. 6, c. 9, where the magistrates proceed upon view, it is not necessary to set out the particular facts presented to their view.

The conviction was as follows:—

Leicestershire, to wit: Be it remembered, that on &c., at &c., *T. B.* and *J. S.* complain to us *A. B.* and *C. D.*, two justices of our lord the king, assigned &c., that *John Wilson*, late of &c., carpenter, into the messuage of them the said *T. B.* and *J. S.*, situate within the parish aforesaid, did on the 28th day of August now last past enter, and them the said *T. B.* and *J. S.* from the messuage aforesaid, whereof the said *T. B.* and *J. S.* at the time of the entry aforesaid were seised to them and their heirs in their demesue as of fee, unlawfully (*a*) ejected, expelled and amoved, and the said messuage from them the said *T. B.* and *J. S.* unlawfully, with strong hand and armed power, doth yet hold and from them detain, against the form &c.; whereupon the said

(*a*) The *expulsion*, not the *entry*, is here alleged to be *unlawful*. There may have been an unlawful expulsion after a lawful entry, either because the parties expelling

and expelled had a joint right of possession, or because a right of possession had accrued to the party expelled between the entry and the expulsion.

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*T. B. and J. S.*, then, to wit, on &c., at &c., pray of us (so as aforesaid being justices), that a due remedy be provided to them in this behalf, according to the form &c., which complaint and prayer by us the aforesaid justices being heard, we the aforesaid *A. B. and C. D.*, the justices aforesaid, to the messuage aforesaid personally have come, and do now here find and see the said *John Wilson* the aforesaid messuage, with force and arms, unlawfully, with strong hand and armed power, detaining, against the form &c., according as they the said *T. B. and J. S.* so as aforesaid have unto us complained. Therefore it is considered by us the aforesaid justices, that the said *John Wilson*, of the detaining aforesaid with strong hand, by our own proper view now here as aforesaid had, is convicted, according to the form of the statute aforesaid: whereupon we the justices aforesaid do set and impose a fine of five pounds to be paid by him to our sovereign lord the king for the said offence, and do cause him now here to be arrested; and the said *John Wilson* being convicted upon our own proper view of the detaining aforesaid with strong hand, as is aforesaid, by us the aforesaid justices is committed to the gaol of our lord the king at L. in the county of L., being the next gaol to the messuage aforesaid, there to abide until he shall have paid the said fine to our lord the king for his offence aforesaid; concerning which, the premises aforesaid, we do make this our record. In witness &c.

The rule nisi was granted on the ground that by 3 Geo. 4, c. 23, the evidence should have been set out, since it could not otherwise appear that the entry was unlawful; a circumstance which, according to *Rex v. Oakley and others*(a), was necessary to constitute the offence.

*Humfrey* for the justices, and *Follett* for *T. B. and J. S.*, the parties interested, now shewed cause. This is a conviction under 8 Hen. 6, c. 9, which empowers justices to act upon their own view. It is therefore unnecessary to state the

(a) *Ante*, vol. i. 58; 4 Barn. & Adol. 307.

*evidence.* None *may* have been adduced; or at all events the evidence would be only *ancillary* to the view. In *Rex v. Oakley* the precedent in *Rex v. Elwell and others* (a) is treated as correct. The conviction in this case follows that precedent. *Rex v. Oakley* merely decides that there must be an *unlawful entry*, as well as a forcible detainer, in order to constitute the offence. Here the *entry* is stated to be *unlawful*.

It appears that the *merits* of the case were gone into. The 3 Geo. 4, c. 23, s. 3, directs, that where the merits have been tried, the conviction shall not be set aside for any defect in form.

*M. D. Hill* in support of the rule. This is not an application to *quash the conviction*, but to *set out facts*, in order that the Court may see whether the conviction is right. The conviction does not set out facts from which the Court can judge whether it was obtained upon sufficient evidence. The conviction, in the first place, recites the information, which certainly *states* an unlawful entry. It then proceeds to say, that the justices then came to the messuage. They therefore went to the house *after the unlawful entry had been made*, and consequently all they could see was a detainer by force. The conviction does not state that the magistrates were *conusant* of an unlawful entry. The adjudication in the conviction finds only one ingredient of the offence, and evidently assumes that there may be a forcible detainer *without* an unlawful entry. [*Williams, J.* Suppose the magistrates had no evidence of an unlawful entry. *Taunton, J.* By the certiorari the justices are only required to return the conviction and all things touching the same. You are complaining that the return is insufficient.] The application is for a mandamus calling upon the justices to set out the evidence in the conviction. As the evidence is not set out, the conviction is not in such a form as to enable the defendant to take the opinion of the Court upon the legality of the conviction, the objection not appearing on

(a) 2 Lord Raym. 1514.

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the face of the conviction; *Rex v. Cashiobury (a)*. [Lord Denman, C. J. It seems to me to be conceded to you that the justices did not see the entry.] If it is not necessary to set out the evidence of the entry, it is unnecessary to set out the evidence of a circumstance which, according to *Rex v. Oakley*, is necessary to constitute the offence. [Lord Denman, C. J. You would put it in the alternative, either the justices *did* see the unlawful entry, then that fact ought to be set out; or they *did not* see it, then the conviction is bad for not setting out evidence given of the fact.] The words of 3 Geo. 4 are imperative, and require the justices to set out the evidence. The third section of that statute which has been referred to is inapplicable, as it relates only to defects *in form*, which this is not. [Taunton, J. I am at a loss to see why you should adopt this mode of getting rid of the conviction. Why not move to quash the conviction? You are asking us indirectly to *support* the conviction by giving the justices an opportunity of shewing that there was evidence, although it does not appear upon the face of the conviction. If the conviction is bad on the face of it, why compel the magistrates to set out the evidence.] Assuming that the magistrates are right in determining that a forcible detainer was committed, although there was no unlawful entry, still they ought to state the facts in order that this Court may see whether a forcible detainer was committed. In *the matter of Rix and another (b)*, a mandamus issued to compel the justices to set out in the conviction the particular evidence adduced before them.

LORD DENMAN, C. J.—In that case, and in *Rex v. Warnford (c)*, there was an affidavit that evidence had been taken, but that it had not been set out in the words used by the witnesses. Here, it is plain, the magistrates did not act upon *any* evidence, but acted upon their own view. The question is simply whether the conviction is or is not good. If the conviction be bad it may be set aside by a proper

(a) 3 Dowl. & Ryl. 35.

(c) 5 Dowl. & Ryl. 489.

(b) 4 Dowl. & Ryl. 352.

application. In the meantime the mandamus would be ineffectual for any purpose.

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LITTLEDALE, J.—It ought to have been shewn to us that there *was* evidence, and that the magistrates have not set it out. The justices may decide upon their own view. They are, therefore, not bound to set out the facts specially. It is sufficient if they find a forcible detainer after an unlawful entry.

TAUNTON, J., after stating the rule, said:—It does not appear that the justices have proceeded upon any facts, but upon their own view. Probably no facts were brought before them in evidence. It is mere speculation whether there was any evidence. I think we ought not therefore to grant this mandamus. I give no opinion as to the *validity* of the conviction.

WILLIAMS, J.—I am of the same opinion. Nothing that occurred is kept back from the consideration of the Court. Whether the justices are right or wrong, they have stated what they took on information, or on view. The object of the whole argument appears to me to have been to try to get the opinion of the Court as to the validity of the conviction.

Rule discharged, with costs.

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The KING v. The JUSTICES of the West Riding of  
YORKSHIRE.

AN appeal against an order for the removal of *James Bullas* and his family, from Doncaster to Warmsworth, was entered, and notice of trial given for the West Riding sessions to try an appeal dismissed for want of notice of trial, where the Court of Quarter Sessions has granted a case upon the question whether it had been rightly dismissed, which has been abandoned by the party applying for the mandamus.

The Court will not grant a mandamus commanding the justices in

the Court of Quarter Sessions

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sessions, at Pontefract, 8th April last. This appeal was respited until the following sessions at Rotherham, on the ground that *Bullas* was undergoing imprisonment for a term which would expire previously to the sessions at Rotherham. At these sessions the appeal was dismissed for want of due notice of trial at the Rotherham sessions, subject, however, to a special case. The appellants abandoned the case, and obtained a rule calling upon the justices to shew cause why a mandamus should not issue, commanding them to cause continuances to be entered to the next sessions, and then to hear and determine the merits of the appeal. The affidavits in support of and against the rule were contradictory, with respect to the fact whether the appeal was respited at the instance of the respondents or of the appellants.

*Milner* now shewed cause (a). A mandamus will only be granted where the parties have no other remedy. In this case the Court of Quarter Sessions granted the applicants leave to draw up a case for the opinion of this Court, and of that permission they have declined availing themselves.

*Dundas*, contra. It is a more convenient course for the parties to apply for a mandamus.

Lord DENMAN, C. J.—We are always unwilling to interfere with the practice of the Court of Quarter Sessions, and if that Court has granted the party a complete remedy, we ought not to interpose. I think the Court of Quarter Sessions cannot adopt a better course than granting a case to a party who is dissatisfied with their decision, where the law is doubtful. When that has been done, a party cannot

(a) Another point was discussed in the argument, but the Court pronounced no decision upon it.

require this Court with high hands to grant a mandamus to the justices to rehear the case.

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LITLEDAL, J., TAUNTON, J. and WILLIAMS, J. concurred.

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Rule discharged.

The KING v. The EQUITABLE GAS COMPANY.

THE defendants had been convicted of a nuisance in corrupting the water of the river Thames. *Campbell, A. G.*, in the course of his address to the Court, in aggravation of punishment, referred to an act relative to another gas company, (which contained a clause directing that it should be a public act,) by which it was provided, that the latter company should incur a penalty of 200*l.* for every offence of this description.

In addressing the Court in aggravation of punishment, upon a conviction for a nuisance, it is competent to the prosecutor to advert to provisions contained in an act relating to a private company, if such act contain a clause declaring it to be a public statute, though it be not referred to in any of the prosecutor's affidavits.

Sir *James Scarlett*, who was of counsel with the defendants, objected that this act could not be referred to, as it was not stated in the affidavits filed; and he cited *Brett v. Beales* (a).

*Campbell, A. G.*, contra, contended that *Brett v. Beales* was wholly inapplicable.

Lord DENMAN, C. J.—We think the attorney-general may refer to the statute to which he has alluded.

(a) 1 Mood. & Malk. 416; S. C. not S. P. 10 Barn. & Cressw. 508.



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## ROGERS v. SMITH and another, (in error.)

The want of a panel to the *distringas* is error, and the defect is not cured by the statutes of *jeofails*.

THIS was a writ of error coram nobis, brought by the original defendants to obtain the revocation (a) of a judgment in an action of *assumpsit*, on the ground that the writ of *distringas juratores* was not returned, and that no panel of the jurors was annexed to the writ (b).

*Alexander*, for the plaintiff in error. This is a question which depends more upon authority than upon principle. It is however highly essential that the proceedings of courts of justice should be regular. *Stainer v. James*(c), *Blodwell v. Edwards*(d), *Becknam v. Rye*(e), *Wilby v. Quinsey*(f), *Buckle v. Scarth*(g), *Ackeridge v. Conham*(h), *Holdesworth v. Sir Stephen Proctor*(i), *Brown v. Johnston*(k), *Crowder v. Rooke*(l), and *Young v. Watson*, reported in the argument in *Rex v. Perry*(m), establish that the want of a return with a panel annexed, is, at common law, a good ground of objection after verdict. Nor is the defect cured by the statutes of *jeofails*, of which only the 18 *Eliz.* c. 14, and 21 *Jac.* 1, c. 13, can be said to affect the present question. The statute 18 *Eliz.* c. 14, aids only an imperfect or insufficient return. Here, there is no return at all. The 21 *Jac.* 1, c. 13, aids the want of return, provided a panel be annexed to the writ.

(a) A judgment recalled for error, by the court by which it was, or by which it purports to have been pronounced, is said to be *revoked*; if set aside by a superior court, it is said to be *reversed*.

(b) A rule to shew cause why the verdict obtained by the plaintiff should not be set aside, or why a *venire facias de novo* should not issue, was granted by the Court in this case, but after hearing *Williams* and *Alexander* in support of the rule, and *F. Pollock* against it,

the Court discharged the rule, intimating that the defendants must bring their writ of error, if so advised.

(c) *Cro. Eliz.* 310.

(d) *Ibid.* 509.

(e) *Ibid.* 587.

(f) *Hob.* 130.

(g) 1 *Rolle's Rep.* 295.

(h) 3 *Bulstr. Rep.* 220.

(i) *Cro. Jac.* 188.

(k) *Bull. N. P.* 324 a.

(l) 2 *Wils.* 144.

(m) 5 *T. R.* 462.

Here, there is no such panel. The 3 *Geo.* 2, c. 25, s. 8, and 6 *Geo.* 4, c. 50, s. 15, contain a legislative declaration of the necessity for a return of the *distringas* and the annexation of a panel.

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*Archbold*, for the defendant in error. There are abundant authorities on both sides. The cases which have been cited are distinguishable. At the common law, the only jury process was the *venire facias*, which directed the sheriff to summon a jury to Westminster, or wherever the venue in the action might be laid. The 13 *Edw.* 1, c. 30, then directed the clause as to *nisi prius* to be inserted in the writ. This was found to be inconvenient, as the parties could not see the panel before the trial took place, and therefore the statute 42 *Edw.* 3, c. 11, was passed, which directed that a return of the names of the jurors should be made before the trial took place. *Blodwell v. Edwards* is therefore distinguishable. There the error assigned was, that there was no return of the *habeas corpora juratorum*, or to the writ in which the *decem tales* was. There was then no *distringas*. Besides, that case was decided before the passing of the 18 *Eliz.* All the other cases which have been cited were determined upon the authority of *Rowland's* case (a), and in that case the error was, not that the *distringas* was informal, but that there was no return to the *venire facias*. Formerly the sheriff generally returned different names to the *distringas* and the *venire*, but by the acts of 2 *Geo.* 3 and 6 *Geo.* 4, the names of the same persons are to be returned to both those writs. It is evident, from reading these statutes, that there need not be a panel annexed to the *distringas*. All that the sheriff is now required to do, is to have the jurors at the time and place named in the writ. *Brown v. Johnston* is also clearly distinguishable, as in that case there was a variance between the *venire facias* and the *habeas corpora juratorum*, not the want of a panel to the *distringas*. In *Crowder v. Rooke* the objec-

(a) 5 Co. Rep. 41.

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tion was, that the trial was had after the day of nisi prius, and for that reason a venire de novo was awarded. In *Young v. Watson*, it was the venire to which there was no return. In *Bacon's Abridgment*, Juries, (I.) (a), it is said; "If there be no venire facias, or if there be such a fault in the venire as makes it a perfect nullity, so that it has no relation to the cause, yet if there be a good distringas, that being one of the jury process, the omission of the former is cured; for the omission of any judicial writ is aided by the statutes, a venire, that is a nullity, and has no relation to the cause, is as if there had not been any; and so of a distringas, where there is a proper venire." It is also said (b), "It was holden, that if before the statute of 21 Jac. 1, c. 13, the sheriff did not return the writ of venire, or set his name on the back thereof, or omitted inserting quod executio istius brevis patet in quodam pannello huius brevi annexo, but it was album breve, it could not be amended upon examination of the sheriff, being the principal process; but this is now helped by the statute, so that a panel of jurors be returned and annexed to the writ." There is also another passage (c), which states that the want of a return to a distringas is cured by the appearance and trial by a proper jury; and for this, *Philipps v. Philipps* (d) is cited. *Comyns's Digest*, Amendment, (G. 1.) (e); *Anonymous*, *Godbolt's Reports*, case 277 (f), *Fowkes v. Child* (g), and *Churcher v. Wright* (h), all establish that this defect is cured by the statutes of jeofails. The 18 Ediz. c. 14, and 21 Jac. 1, c. 13, both apply to a defect of this description. By the former statute the want of a judicial writ is cured. If the writ of distringas therefore, which is a judicial writ, were wanting, the defect would be cured. Therefore the want of a return to that writ must be cured also. The 21

(a) 3 Bac. Abr. 772, 5th and 6th ed.

(b) Ibid. 775.

(c) Ibid. 777.

(d) Andrews, 248.

(e) 1 Com. Dig. 6th ed. 194.

(f) Page 194.

(g) 3 Bulst. 179.

(h) Cro. Jac. 443.

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*Jac.* 1, c. 13, after reciting the acts of 32 *Hen.* 8, c. 30, and 18 *Eliz.* c. 14, enacts, that after verdict, judgment shall not be reversed by reason that there is no return upon any of the said *writs*, so as a panel of the names of the jurors be annexed to the said *writ* (in the singular number). At the period when this act was passed, no panel was in practice annexed to the *distringas*. Until the passing of 35 *Hen.* 8, c. 6, it was not necessary for the sheriff to return the *distringas* at all. He was only bound to have the jurors at Westminster, or the place named in the writ, if the judges should sooner come there. A sheriff is bound to return a writ only where required so to do by act of parliament, by the writ itself, or by a rule of Court. The sheriff was bound, by 35 *Hen.* 8, to return the issues with the *distringas* until the 4 & 5 *Will. & Mary*, c. 24, s. 15, required the sheriff to return the issues into the Exchequer. This continued to be the practice until within a few years. In the case of an *elegit* (a) or writ of inquiry, the sheriff is bound to make a return, but he is required to do so by the terms of the writ. It is not now the duty of the sheriff to return the writ, because by the very terms of the act of parliament the writ is required to be issued with a copy of the panel annexed. It is not, therefore, the duty of the sheriff to annex the panel. Besides, the words of the writ refer to the panel, and therefore it must be annexed before the writ is perfect. *Brooke's Abridgment*, *Retorne de Briefe*, pl. 86 (b), and *Viner's Abridgment*, *Trial*, (T. e.) pl. 13, *in notis* (b), shew that in the reign of *Hen.* 7 it was not necessary to return the *distringas* at all. Formerly, the jury process with the sheriff's return was set out on the record, but some time after the statute of *William & Mary*, the present form was adopted. At the time when every thing appeared upon the record, there might have been some pretence for this objection by way of error, but there cannot now be any reason in it. If the Court should decide that this is a valid objection, there ought to be a *venire de novo*. That, however, can

(a) *i. e.* where *lands* are found. P. 3 *Hen.* 7, fo. 8. pl. 9., and

(b) Citing *Debenham v. Fastolf*, translated 21 *Vin. Abr.* 326.

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only be issued in case of a *mis-trial*. But how can this be a *mis-trial*? The writ of *distringas* need not be returned until four days after the return of the *nisi prius* record. Therefore when the record is returned, it is a good trial.

*Alexander*, in reply. An attempt has been made to distinguish the cases cited for the original defendants, as being applicable only to a *venire*, and not to a *distringas*. Several of them, however, relate expressly to the *distringas*, as others do to the *venire*; and if they did not, there is no solid distinction between those two writs as regards the present question. Several legal positions have also been read from *Bacon's Abridgment*, in answer to the objection; but upon examination, it will be found that the authorities upon which they seem to rest do not warrant the positions themselves. The cases cited are easily distinguishable. In *Philips v. Philips* no final judgment was given. As to the *Anonymous* case from *Godbolt*, which negatives the necessity for a *venire*, it is sufficient to answer that a *distringas* presupposes a *venire*. In *Fowkes v. Child*, there was a panel annexed, and it is perfectly consistent with *Churcher v. Wright*, that there may have been a panel annexed to the *distringas*; and it is apparent, from the facts of that case, that the names of the jurors were inserted in the *distringas*. But it is further contended, that the defect is remedied by the 18 *Eliz. c. 14*, and that as that statute cures the want of a judicial writ, it cures also the want of a return to the writ. If this be so, the statute of *Jac. 1*, after reciting that of *Elizabeth*, provides for the same defect; an absurdity which is not to be supposed. [*Patteson, J.* There is not much doubt that the term "judicial" is not to be construed as meaning "jury" process.] Then as to the 21 *Jac. 1*, the meaning of the clause cited from that statute is, that the want of a return shall not be a valid objection to a writ, provided a panel be annexed to the writ which is objected to. It is immaterial what may have been the practice formerly, as it is now perfectly clear, from the last Jury Act, that it is the duty of the sheriff to annex

to the distringas a panel, containing the same names as in the venire. That duty has been neglected, and the plaintiffs in error are therefore, upon the authorities cited in the commencement of the argument, entitled to the judgment of this Court.

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*Cur. adv. vult.*

Lord DENMAN, C. J., in the course of this term, delivered the judgment of the Court. His Lordship, after stating the ground of the writ of error, proceeded as follows:

It was argued on the part of the plaintiffs in error, that the defect was matter of error at common law, and that it was not cured by any of the statutes of jeofails. For the defendant, in error, it was contended, that the want of a return was cured by 18 *Eliz.* c. 14, or by 21 *Jac.* 1, c. 13, and that no panel was requisite prior to 3 *Geo.* 2, c. 25, s. 8. Several cases were cited, which sufficiently establish the position, that the want of a return or a defective return, was error at common law. The 32 *Hen.* 8, c. 30, was cited, which cures many things after verdict, but not the want of a return to the jury process. Then the 18 *Eliz.* c. 14, followed, which cures the want of any writ, original or judicial; but this, it plainly appeared, has been construed to relate to mesne process<sup>(a)</sup>, and not to jury process. Then the statute of 21 *Jac.* 1, c. 13, expressly cures certain defects in jury process; it does not cure the want of a writ of venire or distringas, but provides "that after verdict, no judgment shall be stayed or reversed by reason that the venire facias, habeas corpora, or distringas, is awarded to the wrong officer, or by reason that there is no return upon any of the said writs,

(a) Though all writs between the original writ and final judgment are strictly speaking, *mesne* process, the term is commonly used with reference to such pro-

cess as issues (after the commencement of the action) for the purpose of bringing the defendant into Court.

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so as a panel of the names of the jurors be returned and annexed to the said writ." This clause is relied on as showing that the *distringas* need not be returned at all, and the mention of a panel is referred to the *venire* only, for it is argued that in the reign of *James 1*, no panel was annexed to the *distringas*, but the names of the jurors who were returned upon the *venire*, were inserted in the body of the writ of *distringas*, until 3 *Geo. 2*, c. 25, which made it unnecessary to insert their names in the body of the *distringas*, and required that it should refer to a panel to be annexed. We are however of opinion, upon an examination of the statute, that the 3 *Geo. 2*, c. 25, was passed not to make it necessary to annex a panel to the *distringas* as a new thing, but to avoid a repetition of the names in the body of the writ as well as in the panel, and that in the reign of *James 1*, a panel was annexed to the *distringas* as well as to the *venire*; and indeed this appears from the case of *Fowkes v. Child(a)*, in which mention is made of such panel. The statute of *James*, therefore, does not cure the want of a return on the *distringas* unless there be a panel, and here there was none. And looking to the words of that statute, it should seem to apply rather to the want of a formal return indorsed on the writ, than to an omission to return it at all, and then the meaning would be, that no judgment should be stayed by reason of a blank return, provided a panel were annexed. In this case no panel is annexed, and we feel ourselves obliged, however reluctantly, to hold that the judgment is erroneous.

Judgment revoked.

(a) Anno 14 Jac. 1; Cro. Jac. 396.

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## MILLS v. REVETT.

A Rule had been obtained on behalf of Mr. Joshua Mayhew, an attorney, calling upon Mills to shew cause why the costs of taxing certain bills of costs of Mayhew should not be paid by him. In 1823, Mills contracted with Revett for the purchase of lands in Suffolk, called the Brandiston Estate. Mayhew was employed by both parties to investigate the title and prepare the conveyance. Mills, by the advice of Mayhew, took possession before the title (which was subsequently discovered to be bad) was completed, and soon afterwards several actions were commenced by him against the tenants of the estate, who refused to pay their rent to him, and damages were recovered. The damages and taxed costs of these actions were received by Mayhew, who, after deducting from the amount so received by him his own (untaxed) charges for conducting the several actions, gave credit to Mills for the balance, which amounted to 1,627*l.* 18*s.* 11*d.* On the 3d of July, 1826, the bills of costs which had been delivered by Mayhew to Mills, amounting to forty-three in number (amongst which were not included his bills of costs in the above mentioned actions against the tenants), were referred by the Court to the Master for taxation. The Master objected to tax certain of these bills, amounting to 182*l.* 14*s.* 5*d.*, on the ground that Mills was not liable to pay them. By a rule of Court, bearing date the 15th day of June, 1832, the Master was directed to retain his report until after the trial of an action to be brought by Mayhew against Mills. In this action the plaintiff obtained a verdict, and judgment was entered up for 3,642*l.* for damages and costs, which was paid by Mills.

The Court refused to require an attorney to pay the costs of taxation, where the deduction beyond one-sixth was occasioned by the Master's disallowing one of the bills delivered, on the ground of non-liability.

Where less than one-sixth is, upon taxation, struck off an attorney's bill, the Court will, as a matter of course, order the client to pay the costs of taxation.

On the 28th of May last, the Master made his report, as follows :



| 1834.          |                                                            | £.    | s. | d. |
|----------------|------------------------------------------------------------|-------|----|----|
| <u>MILLS</u>   | Amount of several bills delivered . . . . .                | 4857  | 19 | 5  |
| <u>v.</u>      | Deduct the amount of bills included therein, and not       |       |    |    |
| <u>REVELL.</u> | chargeable to the plaintiff, and therefore disallowed . .  | 182   | 14 | 5  |
|                |                                                            | <hr/> |    |    |
|                |                                                            | 4675  | 5  | 0  |
|                | Deducted on taxation . . . . .                             | 675   | 19 | 4  |
|                |                                                            | <hr/> |    |    |
|                |                                                            | 3999  | 5  | 8  |
|                | Deduct balance on cash account, due from Mr. <i>Mayhew</i> |       |    |    |
|                | to the plaintiff, the whole of which was received by       |       |    |    |
|                | Mr. <i>Mayhew</i> , for damages and costs in the several   |       |    |    |
|                | actions relating to the Brandiston estate . . . . .        | 1627  | 18 | 11 |
|                |                                                            | <hr/> |    |    |
|                |                                                            | 2371  | 6  | 9  |

If the Master, instead of disallowing the sum of 182*l.*, had taxed the same off, the sum deducted by taxation would have been 858*l.* 13*s.* 9*d.*—a sum exceeding a sixth part of the bill by 49*l.* 0*s.* 7*d.*

*F. V. Lee*, for *Mills*, objected that the affidavits had been improperly entitled *Mills v. Revett*, and that the proper title to the affidavits was *Mayhew v. Mills*.

Sir *James Scarlett*, contra, contended, that as the rule for taxation was taken out in *Mills v. Revett and others*, and as the Master's report was also entitled *Mills v. Revett and others*, the objection was unfounded.

The COURT overruled the objection.

*F. V. Lee* then shewed cause against the rule.

First point:  
Calculation  
with reference  
to gross  
amount of  
original bill.

I. The Master must be considered as having taxed off the 182*l.* 14*s.* 3*d.*; for the attorney *attempts* to charge his client with that sum; and if it is not to be considered as a deduction from the amount of the bills delivered, the attorney has an advantage over the client; he can attempt to charge the client and take the chance of payment; but if the attempt is detected, the attorney has only to withdraw the bill, and the client has no opportunity to punish the attempt improperly to charge him. In such cases it ought to be considered as a deduction, and if it is so considered,

more than one-sixth has been deducted from the amount of the bills delivered, and *Mills* is entitled to the costs of taxation. *White v. Milner* (a) will be relied on by the other side. There it was said that the attorney is not liable to pay the costs of taxing his bill, where the deduction of one-sixth is occasioned not by particular items being taxed off, but by a whole branch of the bill being disallowed; but this rule has never been acted on, and it is opposed to the statute 2 *Geo. 2*, c. 23.

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II. But assuming that 182*l.* 14*s.* 3*d.* has been properly deducted, still by the statute (b), if less than one-sixth be taxed off, the Court in *their discretion* may order *either* the client or the attorney to pay the costs of taxation in regard to the reasonableness or unreasonableness of the bill.

Second point:  
 Discretion of  
 Court as to  
 costs of tax-  
 ation.

The bills in this case are evidently unreasonable, because they were incurred through the negligence or ignorance of the attorney who advised the client that there was a good title to the estate, which he either did or ought to have known was not the case, he being the attorney both of the vendor and of the vendee, and having advised the client to take possession of the estate before the title was complete.

III. There is another objection. The sum of 1,627*l.* 18*s.* 11*d.* ought to have been deducted from the bill of 4,675*l.* 5*s.* If that had been done, the bill would have been 3,047*l.* 1*s.* 1*d.*, and as 675*l.* 19*s.* 4*d.* is the amount deducted on taxation, there would have been more than a sixth taken off, and the client would have been entitled to the costs of taxation; or if that amount ought not to have been deducted, either the amount taxed off Mr. *Mayhew's* bills of costs in the actions relating to the Brandiston estate ought to have been added to the amount taxed off the 4,675*l.* 5*s.*, and if together they amounted to more than a sixth, then the attorney ought to pay the costs of taxation; or the bills in those actions ought to have been now referred to the Master to be taxed with the rest, as between attorney and client.

Third point:  
 What sums to  
 be considered  
 as forming  
 part of the  
 taxable bill of  
 costs.

(a) 2 H. Black. 357.

(b) 2 *Geo. 2*, c. 23.

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First point.

Second point.

Sir James Scarlett and Hutchinson, contra. *White v. Milner* is directly in point. It was there held that an attorney is not liable to pay the costs of taxation, where the deduction is occasioned, not by particular items being taxed off, but by a whole branch being disallowed.

It has always been holden, that the circumstance of less than one-sixth having been taxed off, *conclusively* shews the reasonableness of the charges.

Second point.

LITLEDALE, J. (a)—Upon the last point I should wish to look further into the question, (although Mr. Tidd certainly lays down the rule generally,) had not the rest of the Court been clear upon it. Upon the other two points, I think that the rule must be absolute.

First and
 second and
 third points.

TAUNTON, J.—I think this application has been answered. With respect to the 182*l.*, *White v. Milner* is in point, and nothing can be said in disparagement of that case except that no other can be found: the reason of which is simply this, that it has never been disputed. Upon the objection with respect to the 1,627*l.*, I also think that there is no ground for discharging this rule. That amount might fairly be considered as money paid by *Mills* on account, without reference to the actions against the tenants. A third objection is, that by the statute, if the bill taxed be less by a sixth part, the attorney is to pay the costs of taxation; but if it shall not be less, the Court may order the attorney to pay the costs of taxation, *according to the reasonableness or unreasonableness* of the bill. I believe this provision of the statute has always been considered *reciprocal*. If more than one-sixth is taken off, the attorney pays the costs of taxation; if less, the client. I am of opinion that the costs in this case are reasonable, and that the client ought to pay the costs of taxation. It is somewhere stated by Mr. Tidd, that if a sixth is taken off, the attorney pays the costs; if less, the costs are considered reasonable.

(a) Lord Denman, C. J. had left the Court.

WILLIAMS, J.—The only doubt is as to the last point. We all agree that the 182*l.* cannot be reckoned as part of the amount taxed off. Then, with respect to the point as to the *discretion* given to us by the statute, it seems to me that the safest course in regulating the discretion of the Court, is to take the converse of the rule laid down in the statute. I therefore agree in opinion with my brother *Taunton*.

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Rule absolute.

SMITH, Assignee of COPE, a Bankrupt, v. The BIRMINGHAM and STAFFORDSHIRE GAS LIGHT COMPANY.

TROVER for goods, upon a conversion before and after the bankruptcy. Plea: not guilty. At the trial before *Tindal, C.J.*, at the Staffordshire midsummer assizes, 1833, the following facts appeared:

The goods of *Cope* had been taken, by the directions of one *Lumby*, as a distress for arrears of dues for gas supplied to *Cope* by the defendants, (who are incorporated by 6 Geo. 4, cap. lxxix. (a)) and were sold, by *Lumby's* directions, after notice of the bankruptcy. In order to shew that *Lumby* acted under the authority of the Company, evidence was given of his having been employed and of his having acted as their chief clerk, and having distrained for gas-rents, but it was not shewn (as the defendants con-

In trover against a corporation for the value of goods unlawfully taken by way of distress under the direction of the clerk to the corporation, it is sufficient to give general evidence of authority to distrain, without shewing an appointment under seal.

(a) Which enacted (sect. 69,) That in case any person who should contract with the Company, or agree to take, or should use or enjoy the benefit of the said gas, should refuse or neglect, for the space of twenty-one days after demand, to pay the money then due for the same to the Company, according to the terms and stipulations with the Company, it should

be lawful for the Company or their clerk or superintendent, or any person acting under their authority, by warrant under the hand and seal of any two justices of the peace for the county wherein the offence should arise, to levy the money in respect whereof such refusal or neglect should happen, by distress and sale of the goods, &c.

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tended ought to have been done) that he had been appointed under the seal of the Corporation. A verdict was, under the direction of the learned chief justice, found for the plaintiff; but his lordship gave the defendants leave to move for a nonsuit upon the question whether, in order to charge them with the consequences of the illegal acts of their clerk acting as bailiff, it was necessary to prove an appointment under seal. *R. V. Richards*, in last Michaelmas term, obtained a rule nisi accordingly; against which

J. Jervis now shewed cause. A corporation may authorize their servant to distrain, without the authority being under seal. *Yarborough v. The Bank of England* (a), *Cary v. Matthews* (b). [*Taunton, J.* It is laid down also in *Comyns's Digest* (c), that a corporation may authorize a distress without writing under seal.]

F. V. Lee, on the same side, was stopped by the Court.

R. V. Richards and *Whateley*, contra. A corporation cannot do a tort by their agents, except they be appointed by writing under seal. The decision in *Yarborough v. The Bank of England* does not throw any light upon the subject, for that arose upon a motion *in arrest of judgment*, and the Court said, that if, in an action of trover against a corporation, it was necessary to shew the act constituting the alleged conversion was authorized by them under their seal, such an authority would be presumed *after verdict*. In the course of the judgment delivered in that case by Lord *Ellenborough*, a great number of cases are cited, which shew that a corporation aggregate cannot do a tort except by writing under their common seal. The marginal note to the report of that case is certainly somewhat to the contrary, but it appears to be by no means supported by the judgment. In *Horn v. Ivy* (d), which much resembles the

(a) 16 East, 6.

(b) 1 Salk. 191, note to pl. 3.

(c) "Franchises (F)," 13.

(d) 1 Vent. 47.

present case, it was held, "that a corporation might employ one in *ordinary services* without deed, as to be a *butler* or the like, but one could not appear in an assize as a *bailiff* to a corporation without deed. Neither can they license one to take their trees without deed, nor send one to make a claim to lands. They cannot make themselves *disseisors* by their assent without deed, or command one to enter for a condition broken." [Lord Denman, C. J. In that case of *Cary v. Matthews* (a), it was held, that "a corporation aggregate may appoint a *bailiff to distrain* without deed or warrant, as well as a *cook or butler*;" and the reason given is, that "it neither vests nor divests any sort of *interest* in or out of the corporation." Taunton, J. It is laid down in all the text books—in *Viner's Abr.*, in *Comyns's Digest*, and in other books—that a corporation may appoint one to make a distress without deed. The distinction made, and the reason of it, are manifestly clear.] *Duncan v. The Proprietors of the Surrey Canal* (b), in which it was argued that a corporation was not liable in respect of tortious acts committed by their agent, unless he were shewn to have been appointed under their common seal, was decided against the corporation on the ground that the Company had acted *by themselves*; but Abbott, C. J., made an observation which shews that he was of opinion that incorporated companies were not liable for the acts of their *agents* in the same manner as other persons were. In *East London Waterworks Company v. Bailey* (c) it was held that an incorporated water company could not make contracts for the supply of pipes from time to time, except under seal, although an act of parliament authorized them *to make contracts*, in very general terms. There appears to be no case upon any *modern* acts of parliament in which it has been held that an act such as that which forms the subject of this action could be authorized by a corporation, except

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(a) *Suprà*, 772.

(b) 3 Starkie, N. P. C. 50.

(c) 4 Bingh. 283; S. C. 12 B.
Moore, 532.

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under seal. *Dunstan v. The Imperial Gas Light Company (a)* shews a leaning the other way.

LORD DENMAN, C. J.—There was sufficient evidence given in this case to shew that *Lumby* acted under the authority of the Company in point of fact; and the only question is that which was reserved, namely, whether the Company could be bound by the act of their agent making an unlawful distress, that agent not having been appointed under seal. The decision in *Yarborough v. The Bank of England* was warranted by former cases; and *Cary v. Matthews* expressly puts a bailiff upon the same footing as a butler or cook. The 69th section of the Company's act (b) certainly contemplates the clerk as having authority communicated to him by the act without appointment under seal.

LITLEDALE, J.—The *act* says it shall be lawful for the Company or their clerk or superintendant to issue a warrant of distress; but it is not necessary to consider the peculiar effect of the statute. This is a case in which, according to *general* law, the authority need not be by deed. In addition to *Cary v. Matthews*, which has been already referred to, there is the case of *Manby v. Long (c)*, in which it was held that a man may avow the taking cattle damage feasant, as bailiff to a corporation, without having any precept in writing. In *Horn v. Ivy (d)* it is said that a corporation may employ one in *ordinary* services without deed, and the cases in which it is said that a deed is requisite are cases in which an *extraordinary* act is to be done. The act done *here* is a common act, and is therefore, I think, one of those services in which a corporation may employ a man without writing under seal.

TAUNTON, J.—I have no doubt upon the law of this

(a) 3 Barn. & Adol. 125.

(b) *Supra*, 771 (a).

(c) 3 Lev. 107.

(d) *Supra*, 772.

case. It has always within the time of my knowledge been the common text-law, that a corporation may authorize a bailiff to *distrein* without writing under seal, but that where an *estate* is to be *vested* or *divested*, there must be a deed (a).

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WILLIAMS, J.—I am entirely of the same opinion. In *Roe d. Dean and Chapter of Rochester v. Pierce* (b) it was held by *M'Donald*, C. B., that in ejectment by a corporation against a tenant from year to year, a notice to quit, given by a person *acting* as steward of the corporation, and *authorized* by them, was sufficient, without evidence that he had *authority under seal* for that purpose.

Rule discharged.

(a) For the cases in which an estate vests immediately and without agreement, by the act of a stranger, *vide* Co. Litt. 245 a, b, 258 a; 3 Tho. Co. Litt. 18, 57, 58. And see the note to *Snall v. Marwood*, 4 Mann. & Ryl. 189, 190.

(b) 1 Campb. 466.

DICKSON v. BAKER.

F. KELLY had obtained a rule calling upon the plaintiff to shew cause why the outlawry of the defendant should not be reversed or set aside, the defendant having taken the benefit of the Insolvent Debtors' Act.

After judgment on a warrant of attorney, given as a collateral security for an annuity, and the usual proceedings to obtain an outlawry upon final process, a writ of exigent issued to the sheriffs of London, returnable 2nd November, 1833. On the 30th October, 1833, the defendant offered to surrender himself; but the sheriffs refused to take him into custody, on the ground that the fifth Husting had been on the 29th October. On the return of the exigent therefore the defendant was outlawed: 6th November, 1833, the de-

The Court will not reverse an outlawry on the ground that the defendant has taken the benefit of the Insolvent Debtors' Act, and the debt is inserted in his schedule.

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defendant filed a petition for relief in the Court of Insolvent Debtors, and in the schedule of his debts included that of the plaintiff. The matters of the petition came on to be heard 3d January, 1834, when the defendant's discharge was opposed by the plaintiff. The Insolvent Debtors' Court ordered that the defendant should be discharged at the expiration of eight months from the hearing of the petition. No *utlagatum capias* (a) had ever issued. On the 7th June,

Follett and *Sandford* shewed cause. There is no provision in the Insolvent Debtors' Act (7 Geo. 4, c. 57,) for the relief of a party who is imprisoned upon any writ of outlawry; from which it must be inferred that the act was not intended to apply to matters of outlawry. The 10th section authorizes persons imprisoned for debt, damages, costs, sums of money, or for contempt in nonpayment of money or of costs, to petition for relief; but no mention is made of persons imprisoned for outlawry. In *Castelman's* case (b) it was expressly held, that a person charged with an outlawry could not be relieved under the Insolvent Debtors' Act (c). This case is referred to in that of *Beauchamp v. Tomkins* (d), from which it appears that bankruptcy and certificate would not entitle a defendant in custody under an *utlagatum capias* to be discharged. There is therefore no reason why a discharge under the Insolvent Debtors' Act should have that effect.

The defendant has not at present completed the period of his imprisonment, and is not as yet entitled to the benefit of the Insolvent Debtors' Act. He is therefore not in a situation to apply to have the outlawry reversed.

F. Kelly, in support of the rule. Outlawry is described by *Mr. Tidd* (e) to be the putting a man out of the protec-

(a) As to this process and the inquisition thereon, see Mann. Exch. Pract., Revenue Branch, 2d ed. 95, 189, 265 n., 314.

(b) 4 Burr. 2119.
 (c) 3 Geo. 3, c. 41.
 (d) 3 Taunt. 143.
 (e) 9th ed. 11.

tion of the law (*a*), so that he is incapable of suing for the redress of injuries, and may be imprisoned; and he forfeits thereby all his goods and chattels, and the profits of his lands; his personal chattels immediately upon the outlawry, and his chattels real and the profits of his land when found by inquisition. Mr. *Tidd* adds—"So penal were the consequences of an outlawry, that, until some time after the conquest, no man could be outlawed except for felony, the punishment whereof is death." When the consequences of outlawry are considered, it is not unreasonable to suppose that the legislature intended to extend the relief given to insolvent debtors to such as were imprisoned or subject to any outlawry. The defendant has inserted the plaintiff's debt in his schedule, and is therefore exonerated from it, so far as his *person* is concerned. [Lord *Denman*, C. J. I do not see how you can use the schedule.] By the 76th section a copy of the schedule, purporting to be signed by the officer and certifying the same to be a true copy, and sealed with the seal of the court, is to be admitted in all courts as sufficient evidence of the same. [Lord *Denman*, C. J. Unless the schedule is referred to in the rule nisi, it is not brought to the notice of the opposite party.] By the 46th section, the Insolvent Debtors' Court is authorized to discharge the prisoner out of custody. By the 50th section, the discharge is to extend to *all process issuing from any court* for any contempt of any court, ecclesiastical or civil, for nonpayment of money, or of costs or expenses in any court, ecclesiastical or civil. The 60th section provides that no person who shall have become entitled to the benefit of the act shall at any time thereafter be imprisoned by reason of any debt, money or costs, to which the adjudication shall extend; and by the 61st section, no execution is to issue against an insolvent for any debt or money to which the adjudication extends. The defendant in this case will

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(*a*) A party rehabilitated, or restored to the protection of the law, by the pardon of his outlawry, is in the old books said to be *inlawed* (*inlagatus*).

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be discharged from the debt as soon as he has completed his imprisonment. The 50th section exonerates him from the costs of the proceeding for the recovery of the debt. Is then an outlawry, which is a part of the proceeding for the recovery of the debt, to be allowed to remain against him? The only object of the outlawry is to obtain payment of the debt and costs, from which the defendant is now discharged. If he were *arrested* upon a *capias utlagatum*, he might, by virtue of the 60th section, be discharged from that arrest. The assignment of all the debtor's property operated as a *satisfaction* of the judgment. The party is consequently entitled to be discharged from process founded on that judgment. In *Beauchamp v. Tomkins* the defendant had allowed the time to pass by within which he could have reversed the outlawry, and the party was *charged* upon a *capias utlagatum*. Here there was no *capias utlagatum*, and the defendant has been guilty of no laches. He could have come in and put in special bail, and reversed the outlawry. *Castelman's* case (a) was not decided upon the Insolvent Debtors' Act now in force.

LORD DENMAN, C. J.—It may perhaps be a just consequence that as the debt is discharged by the Insolvent Debtors' Act, the outlawry also should be avoided. If that Act *has* the operation of avoiding the outlawry, the interference of this Court is not necessary. When the Court is required to do an act out of the ordinary course, some precedent should be shewn. None such has been produced, and therefore the rule must be discharged.

LITLEDALE, J.—I am of the same opinion. *Castelman's* case has not decided anything with reference to the Insolvent Debtors' Act now in force. In *Beauchamp v. Tomkins* there was error in fact. In a case in *East* (b) it was held, that a person who is outlawed has no locus standi

(a) *Supra*, 776 (b) (c).(b) *Summervil v. Watkins*, 14 East, 536.

in judicio. In every outlawry the *crown* is interested. I think we have no authority to reverse an outlawry, except for error apparent on the proceedings.

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TAUNTON, J., and WILLIAMS, J., concurred.

Rule discharged.

FRANKLIN v. FEATHERSTONHAUGH.

THIS was a rule calling upon *Becke, Son and Collison* (formerly the defendant's attorneys) to shew cause why the Master should not review his taxation in this cause, or why the costs of *George Smith* (the defendant's present attorney), of or occasioned by this taxation, should not be taxed by the Master, and paid or allowed by *B., Son, & C.*

An attorney is authorized to insert in his bill of costs the amount paid to a proctor employed by him for his client.

The bill contained the following items :

	£	s.	d.
" Paid costs of contempt	7	15	2
Paid Messrs. <i>Farrers & French's</i> costs . .	2	2	0
Paid Messrs. <i>Bor & Son</i> for their charges .	5	1	6"

In taxing the attorney's bill, the Master is not bound to inquire into the reasonableness of the bill so paid to the proctor.

The first two items were the costs of a contempt, incurred by the defendant in the Ecclesiastical Court; the last was the amount of the bill of costs of proctors employed by *B., Son, & C.* to purge the contempt. Deductions from the bill of the costs of the contempt had been procured by *Bor and Son*, and the bill of these proctors themselves was shewn by Mr. *Becke* to the taxing officer of the Ecclesiastical Court, and declared by him to be moderate, but it was not taxed, there being no power to compel taxation in the Ecclesiastical Court of a bill of costs *as between proctor and client*. Upon the taxation of the bill of costs of *B., Son, & C.*, these facts were shewn to the Master; and being required to tax the last three items or not to include them in

In considering whether more than one-sixth of such attorney's bill has been taxed off, the entire amount of the bill must be taken inclusively of such proctor's bill.

According to the practice of the Ecclesiastical Court, a bill of costs cannot be taxed as between proctor and client.

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his allocatur, he declined to tax, and did include them in his allocatur. A sum was struck off from the bill which would exceed one-sixth of the amount of it; exclusive of those three items, but which is less than one-sixth of the whole bill as delivered. *Smith* obtained a summons calling upon *B., Son, & C.* to shew cause why they should not pay the costs of taxation; and the parties appearing under this summons before *Taunton, J.*, he held that the items were properly included in the allocatur, as *disbursements* within the meaning of 2 *Geo. 2, c. 23*, and therefore made no order. *Smith* obtained a second summons, calling upon *B., Son, & C.* to shew cause why it should not be referred to the Master to tax the particulars of the last three items of their bill, or why he should not be at liberty to review his taxation. The parties attended in pursuance of this summons before *Patteson, J.*, who, after hearing the parties and consulting with the Master, said that he thought that the Master was right in declining to tax the three items, and dismissed the summons. A summons similar to the first was subsequently obtained by *Smith*, but upon the parties appearing before *Vaughan, B.*, the learned baron refused making an order thereon. The costs, as allowed, had not been paid by the defendant or his attorney; and an action upon the bill had been commenced in C. P.

Follett now shewed cause. These disbursements were properly included in the bill and allowed by the Master. The act of 2 *Geo. 2, c. 23 (a)*, provides that no attorney or solicitor shall commence any action for the recovery of any fees, charges or *disbursements*, at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, &c. a bill of such fees, charges and *disbursements*. In *Ex parte Inman Wood (b)*, it was held, that in fact attorneys are bound to

(a) Sect. 23.

(b) 1 Buck, 129.

include such items (a) as these in their bills of costs. [Taunton, J. In a late case (b) this Court were of opinion that disbursements made by an attorney in the course of a cause were properly included in the bill, although the client had supplied him with money for the purpose. I am not, however, sure that the decision proceeded upon that ground.] It is so laid down in *Tidd's Practice* (c), where it is said, "If a client, in the course of a cause, advance money to his attorney for specific disbursements in the cause, those disbursements must nevertheless be included in the bill of costs. Therefore where a sum was deducted upon taxation less than one-sixth of the amount of the bill delivered, *including those disbursements*, the Court of Common Pleas ordered the *client* to pay the costs of the taxation." The authority for this position is *Hindle v. Shackleton* (d). These are disbursements which the attorneys were not only *authorized* but were *bound* to include in the bill; and therefore less than one-sixth of the amount having been struck off, the client must pay the costs of the taxation.

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R. V. Richards, *contrà*. Either these items ought not to be included in the bill at all, or, if included, they should be taxed. The proctor was employed by *B., Son & C.* in the same way as an *agent* in London is employed by an attorney in the country. It is the common practice to tax the bill of such agent when the amount of it is included as a disbursement in the attorney's bill of costs. The Master need not in reality tax the proctor's bill himself, but should do it in form, and send it to the proper officer in the Ecclesiastical Court, to be taxed by him.

Lord DENMAN, C. J.—I think that this rule must be discharged. It is the constant course to consider disburse-

(a) In that case the disbursements included extra fees paid to commissioners of bankrupt, which had been disallowed on taxation.

(b) *Hays v. Trotter*, *ante*, vol. iii. 174.

(c) Vol. i. p. 336, 9th edit.

(d) 1 Taunt. 536.

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ments of this description as properly forming part of an attorney's bill, and therefore they were rightly included in the allocatur. The Master appears to have looked at the bills in the Ecclesiastical Court, and to have thought the deductions sufficient.

LITTLEDALE, J.—I also think that the rule should be discharged. In general, bills of costs incurred in another Court are referred to the Master of that Court for taxation, but it appears that there is no power in the officer of the Ecclesiastical Court to tax a proctor's bill as between proctor and client, unless with the consent of the proctor. The Master might use his discretion how far he would inquire into the reasonableness of the proctor's bill.

Rule discharged, without costs(a).

(a) And see *Ramsden v. Hilton*, Dickens, 322; *Yes v. Frere*, 14 Ves. 154.

DOE dem. THOMAS FOSTER v. The EARL of DERBY.

A., being possessed of Blackacre and Whiteacre by the same title, conveys Blackacre to B. Evidence, given by witnesses since dead, in an action between C. and A. respecting the title to Whiteacre, brought subsequently to the conveyance from A. to B., is not admissible in an action between C. and B. as to the title to Blackacre.

Where two ejectments depending upon the same title are brought by A. against B. and C. respectively, at the same time, and come on for trial on the same day, and that of Doe d. A. v. B. having been decided against B., C.'s counsel consents that a verdict shall pass against him in Doe d. A. v. C., on the ground that the evidence is the same in both cases; the evidence given in Doe d. A. v. B. cannot be admitted on behalf of A. in an action subsequently brought, respecting the same title, by C. against A., unless A. proves clearly that it was agreed between himself and C., on the former occasion, that the evidence given in Doe d. A. v. B. should be considered as repeated in the action of Doe d. A. v. C.

EJECTMENT. At the trial before Alderson, J. at the Lancaster spring assizes in 1834, it appeared that this action was brought to recover possession of land, called Huyton, which had formerly belonged to a lady of the name of Travers, who died intestate, in January, 1823. Upon her death Henry Foster claimed the land, as her heir at law, and entered into possession of Huyton and of another estate, called Croft.

The Earl of *Derby* bought Huyton of *Henry Foster*, who executed a conveyance of it. In 1826, two ejectments, to recover this property, upon the demise of *Thomas Foster*, the present lessor of the plaintiff, who claimed as heir at law to *Mrs. Travers*, against *Henry Foster and the Earl of Derby* respectively, were tried. In each of these cases there was a verdict for the plaintiff. In 1830, two other actions of ejectment against *Thomas Foster*, respectively on the demises of *Henry Foster* and of the Earl of *Derby*, were tried. That on the demise of *Henry Foster* came on to be tried first. A considerable body of evidence was given on the part of *Henry Foster*; and, amongst other witnesses, persons of the names of *Foster* and *Rigby* were examined. No evidence was given on the part of the defendant, and a verdict passed for the plaintiff. The cause in which the Earl of *Derby* was the lessor of the plaintiff was then called on, and the jury were sworn. The defendant's counsel(a) then intimated to the judge, that, as that case depended upon the same evidence as the preceding one, and as the jury had expressed their opinion of it by their verdict, he considered it unnecessary that such evidence should be repeated, but consented to a verdict being found for the plaintiff in that action also, which was accordingly done.

At the trial of the present action a number of witnesses were examined on the part of the plaintiff. It was then proposed, on the part of the defendant, to give in evidence the examinations of the two witnesses, *Foster* and *Rigby*, who had died since the former trial. It was objected by the plaintiff's counsel, that this evidence was inadmissible, as the former cause was *res inter alios acta*. To this it was answered, that the title was the same as in the action tried in 1830, in which *Henry Foster* was the lessor of the plaintiff, and that the plaintiff's counsel had then an opportunity of cross-examining the witnesses, if he had thought proper so to do. The learned judge rejected the

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evidence, on the ground that the proceedings in the former action were to be considered as *res inter alios acta*, and a verdict was found for the plaintiff. In Easter term a rule *nisi* for a new trial was obtained by *Alexander*, on the ground that the evidence was improperly rejected.

First point :
Whether evi-
dence to be
considered as
repeated in the
second cause.


F. Pollock, Tomlinson, and J. Addison, now shewed cause. It is only by mis-stating some of the rules of evidence that colour can be given to the admission of the evidence which was rejected by the learned judge. It is settled, that the lessor of the plaintiff is to be considered as the party suing. The first question, therefore, is, whether the evidence taken in *Doe d. Henry Foster v. Thomas Foster*, was to be considered as given in the other action of *Doe d. The Earl of Derby v. Thomas Foster*. There is no doubt that it was not actually read, and it cannot be considered as given. The parties had no intention of perpetuating the testimony in the cause.

Second point :
Whether evi-
dence admissi-
ble on the
ground of
identity of title
or privity of
estate.

The next question to be considered is, whether, (without reference to the question of an agreement between the counsel) the evidence is admissible. It is submitted that it is not. There is no mutuality between the parties, and it was upon that ground that the learned judge rejected the evidence at the trial. Suppose one of the witnesses, who had been examined on the former trial on behalf of *Thomas Foster*, had died, and it had been proposed to use that testimony against the Earl of *Derby*, it would have been inadmissible.

Then it is said, that the Earl of *Derby* claims unity with *Henry Foster*, and is privy in estate; and that, therefore, the evidence was admissible. The estate was divided into two parts: part remained with *Henry Foster* and part was sold to the Earl of *Derby*. This evidence is not inadmissible, merely because there is an identity of title. Suppose a father, with seven sons, devises his land to be equally divided by metes and bounds between them; a verdict in an action of ejectment against the father would be evidence against the sons, but a verdict in an action of ejectment against one of the sons, would not be evidence against the

others. It is said that this evidence is admissible, because the parties are substantially the same. The rule undoubtedly is, that a verdict in one action is admissible in evidence upon the trial of another action upon the same question, where the parties are substantially the same. But the word *substantially* has various meanings, and the only mode of ascertaining the sense of the word is to examine the cases by which it is usual to illustrate the rule. One of the illustrations is this: that a verdict in an action of *ejectment* is evidence in an action for mesne profits, brought by *the lessor of the plaintiff* against the defendant in that ejectment. It is true also, that if there is privity between the parties in the second action and those in the first, the verdict in the first is admissible in evidence. But if the decisions on this subject are examined, it will be found that this rule applies only in cases where the privity has been created *subsequently* to the first trial.

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Alexander, Wightman, and Cowling, in support of the rule.

If the *verdict* on the former trial was admissible on the Second point. latter, the *examinations* of *Foster* and *Rigby* were also admissible. Now it is manifest, from the authorities, that such verdict was admissible. On the trial in 1830, *Henry Foster* claimed, as heir of *Mrs. Travers*, and the Earl of *Derby*, who had purchased of *Henry Foster*, claimed through him. The title, therefore, on which the parties rested their respective claims was the same, viz. by descent from *Mrs. Travers*. The defendant, on both occasions, set up an adverse title, as heir at law of the same lady. The question, therefore, as regarded him was the same, and the property in dispute is admitted to be part of the estate which descended to the heir at law of *Mrs. Travers*. There is, therefore, an identity of title and of subject-matter in the several actions. It is true, that there is still wanting an identity of parties, inasmuch as the verdict was given between *Henry Foster* and *Thomas Foster*, though

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offered as evidence between the Earl of *Derby* and *Thomas Foster*. But that becomes immaterial in consequence of the privity of the estate that existed between the Earl and *Henry Foster*. Now the rule of law upon this subject, as collected from the various authorities, is, that a verdict or judgment in a former action upon the same matter, directly in question, is evidence for or against privies in blood, privies in estate, or privies in law, as well as for or against the parties to the suit (a). One who claims in privity with another, is in the same situation with the latter, as to any verdict or judgment either for or against him, whether he claim as privy in blood, or estate, or as privy in law (b). It is not essential that the parties should be precisely the same, if they are so substantially; thus in ejectments, the law recognizes the real parties.

In *Comyns's Digest* (c) it is laid down, that "a verdict in another action for the same cause, shall be allowed in evidence between the same parties. So shall it be evidence where the verdict was for one under whom any of the parties claim." So in *Vin. Abr.* tit. *Evidence*, (A. b. 76,) (d), it is said, "A verdict against one, under whom either plaintiff or defendant claims, may be given in evidence against the party so claiming. *Contrà*, if neither claim under it." It is also there said, "In an ejectment brought by a reversioner, or in debt upon statute *H. 6*, by a proprietor of tithes, they may give in evidence a verdict for the former lessee, because the parties to this action could not have been parties to the former suit, in that the present lessee could be only a party." Other authorities, confirmatory of this view of the case, are also to be found under the same title, (A. b. 31,) pl. 27, 31 (e). In *Bulles's Nisi Prius* (f), it is said, "As to verdicts, the rule is, that

(a) *Phil. on Ev.* 324 (7th edit.), where the authorities are collected.

(b) 1 *Stark. Evidence*, 218, (2nd edit.), where the authorities are collected; *Com. Dig. Evidence*, (A. 5.)

(c) *Tit. Evidence*, (A. 5.)

(d) 12 *Vin. Abr.* 136, pl. 1.

(e) 12 *Vin. Abr.* 110.

(f) P. 232 a, (7th edit. with notes by Mr. *Bridgman*, an attorney of Bath.)

no verdict shall be given in evidence, but between such who are parties or privies to it." The note (a) adds, " But the benefit of this rule is generally mutual. It is, however, liable to exception; in cases where a man is privy in estate with him who recovers the verdict, for then the verdict will be evidence for him, though he would not have been bound by it, had it been the other way. *Gilbert on Evidence*, 34." The rule is also similarly pronounced and illustrated by a variety of cases in *Bacon's Abridgment* (b). *Kinnersley v. William Orpe* (c) is a strong authority in favour of the admissibility of this verdict. That was an action for debt, by the owner of a fishery, for a penalty of 5*l.* under the statute 5 *Geo. 3*, c. 14, s. 13 & 14, for killing fish in the plaintiff's fishery. The defendant was the servant of Dr. Cotton, who claimed the fishery in question. A former action had been brought against another servant of Dr. Cotton, for a penalty in fishing in the same fishery, when a verdict was found for the plaintiff. The Court held the record of the judgment and verdict in the first action admissible in the second, although the causes were not between the same parties. It is not necessary that the former verdict should have been founded upon the same precise subject-matter, provided the question be the same and between the same parties. It has been adjudged, that "it is not necessary that the verdict should be in relation to the same land: for the verdict is only set up to prove the point in question, and every matter is evidence that amounts to a proof of the point in question (d)." With an identity of title and a privity of estate, it was, therefore, competent to the Earl of Derby, to give in evidence the verdict of 1830; and, if so, the examinations of *Foster* and *Rigby* were admissible. The only additional ground for their rejection is, that the party had not had the opportunity of cross-examining them. Now the general rule upon this

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(a) See the last note.

(b) Vol. ii. 616.

(c) 2 Dougl. 517.

(d) Bull. Ni. Pri. 232, citing *Sherwin v. Clarges*; S. C., per nomen *Clarges v. Sherwin*, 12 Mod. 343.

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subject is, that depositions of witnesses are inadmissible, unless the party to be affected by them has cross-examined the deponents, or has been legally called upon, and had the opportunity so to do (a). Here, there was the opportunity of cross-examination, and it was the defendant's own choice that he forbore to avail himself of it. . . .

First point.


But assuming that the examinations are not otherwise admissible in evidence, what passed at the trial was in effect the same as if the witnesses had *repeated* the facts which they had detailed in the preceding trial. The course of proceedings taken by the defendant was to rely on the chance of the insufficiency of the plaintiff's evidence. It was obvious, that on the second trial the same testimony would be adduced that had already gained the verdict in the first; and it was about to be repeated, when the defendant's counsel consented to a verdict in the second ejectment. And this view is materially strengthened by the fact, that rules nisi for a new trial were obtained in these two causes, by the defendant, in the following term, upon precisely the same grounds, viz., an objection founded on affidavit to the evidence of *Rigby*. But how, in the latter of these causes, would such a rule have been granted, unless *Rigby's* evidence had been considered as given in at the trial? The fair interpretation of the matter is, that the defendant considered the evidence, both on examination in chief and cross-examination, as virtually read upon the second trial, and he ought not now to be permitted to allege the contrary.

Second point.

Lord DENMAN, C. J.—Assuming that there had been no *agreement*, between the counsel of the parties at the trial, that the evidence given in *Henry Foster's* case should be considered as repeated in the case in which the Earl of *Derby* was a party, I think it is clear there was no such privity between them as to enable Lord *Derby* to give in evidence, in this cause, the evidence given in the case

(a) Stark. Evid. 264; *Casenove v. Vaughan*, 1 Maul. & Selw. 4.

between *Henry Foster* and *Thomas Foster*. The evidence was therefore inadmissible, for the reason given by the learned judge at the trial. As to *Kinnersley v. William Orpe*, that case can only be accounted for on the ground that the person, who claimed the fishery, was substantially the same in both cases. Then comes the question as to what occurred at the trial. Upon this, I own, I have felt considerable difficulty. The rule was granted, in the first instance, on the supposition that what passed at the former trial amounted to an agreement that the evidence given on the first trial should be considered as read at the second trial, and the circumstance of the motions for a new trial, in both those cases, having been made upon the same ground, rather confirms this view of the case. Taking the additional facts now mentioned, I have some doubt of the real history of the case. In order to have made this evidence admissible, in a second ejectment between *T. Foster* and *The Earl of Derby*, it ought to have been distinctly understood between the parties, at the former trial, that the evidence given in the ejectment between *Henry Foster* and *Thomas Foster*, should be considered as repeated; and, I think, that the burthen of proving that such was the case lay upon the defendant. The defendant has failed to shew that there was any such distinct understanding, and, therefore, this rule must be discharged.

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LITLEDALE, J.—No doubt a verdict in one trial is evidence in another, upon the same question, between the same parties. It is also laid down, in *Comyns's Digest* (a), that a verdict shall be evidence where it was for one *under* whom any of the parties claim. That, no doubt, is true, where the person claiming under the party to the former action has derived his title *since* the trial of that action. In such cases the only question is, whether the title was derived before or after the trial.

(a) *Evidence*, (A. 5.)

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The other point it is not necessary to discuss. We are not to take any general understanding of the parties. If the witnesses were regularly examined, or any argument was entered into respecting the examination of witnesses, that will appear by the judge's notes. The judge's note-book does not shew any examination of witnesses, or any such agreement. As to *Kinnersley v. William Orpe*, there was virtually the same defendant in both cases. For both these reasons,—that the action was not between the same parties, and that there was no distinct agreement between the parties that the evidence given in the one action, should be considered as having been read in the other, I think, the rule should be discharged.

TAUNTON, J. concurred.

WILLIAMS, J., having been of counsel in the case, gave no opinion.

Rule discharged.

WRIGHT and another v. DEWES, CHEATLE, and others.

Growing corn sold under a fi. fa, is not distressable for rent accruing due after the seizure in execution.

TRESPASS for breaking and entering the plaintiff's close, situate at Chilcote, in the county of Derby, and cutting down, reaping, and carrying away ten acres of wheat, his property, there growing. Plea: not guilty. At the trial before *Denman, C. J.*, at the Derbyshire spring assizes 1833, a verdict was found for the plaintiff, and leave was given to the defendant to move to enter a nonsuit. The facts were subsequently, by an order of the Court, stated in a special case, which was in substance as follows:

11 June, 1831. The plaintiffs being joint creditors of one *Mosley*, who occupied a farm at Chilcote, as tenant from year to year, (under a parol agreement,) to one *Robertson*, obtained judgment against *Mosley* in an action brought by them, for the amount of their debt.

1 Sept. 1831. A *fi. fa.* issued, directed to the sheriff of Derbyshire, to levy 106*l.* 1*l.*

8 Sept. The sheriff seized under the *fi. fa.* certain goods of *Mosley*, then on the farm, and remained in possession of the goods until the 31st of October following.

20 Oct. The sheriff seized under the same execution the crops of wheat which were the subject of this action, and which were then growing upon the farm.

31 Oct. The sheriff bargained and sold the wheat to the plaintiffs in consideration of 106*l.* 1*l.*s., and the plaintiffs were put into possession of the wheat.

At the time of executing the bargain and sale, 31*l.* 15*s.* 6*d.* was owing to the landlord for rent, due at Michaelmas, 1831.

Jan. 1832. The whole of such arrears was paid by the plaintiffs to the landlord.

26 March, 1832. Before the said growing crops were ready to cut, a distress was put in upon the farm by the defendant *Cheatle*, as agent of the landlord, for a half-year's rent, due on the 25th March, 1832.

Subsequently to the execution of the bargain and sale, and under this distress, the crops in question were seized; and afterwards reaped and taken away by the defendants.

The question for the opinion of the Court is, whether, by virtue of the sale by the sheriff to the plaintiffs, they are entitled to the crops, discharged from the landlord's distress for rent accruing subsequently to the sale. If the Court shall be of opinion that the plaintiffs are so entitled, the verdict to stand, otherwise a nonsuit to be entered.

N. R. Clarke, for the plaintiff. The purchaser is entitled to retain the crops. *Peacock v. Purvis* (a) is in point. In that case it was expressly determined, that growing crops of corn, which had been sold by the sheriff, could not be distrained for rent accruing subsequently to the entry under the execution. This overruled the dictum of *Thomson, C. B.*

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First point:
Whether dis-
tress good at
common law.

(a) 5 B. Moore, 79; 2 Brod. & Bingh. 362.

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Second point: 3d section authorizes the sheriff to dispose of any crops
Effect of 56 Geo. 3, c. 50.

to the contrary, in *Guilliam v. Barker* (a). [Taunton, J. It was a mere obiter dictum, not necessary to the decision of the case.] The defendants rely on the 56 Geo. 3, c. 50, and contend that by that act the sale is invalidated. The “where no covenant or written agreement is shewn,” to use and expend the same on such lands, in such manner as shall accord with the custom of the country. Nothing is stated in the special case which brings this case within the operation of the 3d section. It is not found that the sheriff carried off any straw, or that he sold or conveyed the crops to be consumed off the premises. But nothing which the sheriff may have done can at all affect the right of the purchaser. The act is directory; or supposing it to be mandatory to the sheriff, and to render him liable to an action for his wrongful acts, the sale by him is not avoided. Were it otherwise, it would be dangerous to purchase from the sheriff any description of farming stock. The 9th section is a key to the construction of the act. That clause provides that the sheriff shall not be liable for any breach of the provisions of the act, unless such breach be wilful. The intention of the legislature therefore was, that if by lease,—by an agreement in writing,—or by the custom of the country, the tenant whose crops are seized was bound to expend the straw upon the land, the sheriff should sell the crops upon the same terms as those by which the tenant was bound, and that if he neglected to do so he should be liable to an action. Can it be contended that a departure in any one particular from the various and minute provisions of the statute will make the sale void, and subject the purchaser to the loss of the property he has paid for? It has frequently been decided that an irregularity in conducting an execution does not vitiate the sale under it.

Daniel, for the defendants. This verdict ought to be set aside on two grounds. First, the sale is void, there

(a) 1 Price, 277.

being no evidence that the agreement directed by 56 Geo. 3, c. 50, s. 3, had been entered into. Secondly, admitting the sale to be good, a landlord is at common law entitled to distrein property remaining upon the premises, for rent becoming due subsequently to the sale.

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The statute was passed to remedy a particular mischief, Second point: and ought to receive that construction which will most advance the remedy and repress the mischief. The particular mischief was, that growing crops being liable at common law to be taken in execution and sold as goods and chattels, the purchasers did not become either assignees or occupiers, and were therefore not liable either upon the express covenants of the tenant, or upon the general custom of the country; but they were entitled to take from the land the whole of the crop, both grain and straw, to the manifest impoverishment of the land, and in direct violation of either express covenant or general custom. To remedy this mischief the statute, by the 1st section, takes away the sheriff's power of selling, for the purpose of its being carried off the land, the straw of growing crops *in any case whatever*, or artificial grasses and roots which by express covenant ought to be used and expended on the land. And by the 3d section, the sheriff is empowered to sell the crops or produce thereinbefore (i. e. in the 1st section) mentioned, to any person who shall agree in writing with such sheriff, to use and expend the same on the lands, either according to express covenant or general custom, (as the case may be.) By the 4th section, the sheriff is required to permit actions to be brought by the landlord in his name, for any breach of this agreement; and by the 11th section it is enacted generally, that no purchaser of the crops &c. of any person employed in husbandry, shall use or dispose of any straw &c., or other produce of such lands, in any other manner or for any other purpose than such person so employed &c. would have used or disposed of the same. On the part of the defendant it is contended, that this statute is in effect a repeal of the sheriff's common law power to sell growing

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crops, and the substitution of a power limited and restricted by the various provisions of this act; and therefore that a person claiming to be a purchaser of growing crops from the sheriff, must shew that the sale has been conducted in the manner directed by the act. This, it is in effect admitted that the plaintiffs are unable to do, the case not stating any agreement. The agreement directed by the 3d section has not been entered into, and in short the sale took place without reference to the statute. The sale was of so many acres of growing wheat, and under that the plaintiffs claim, in the shape of damages from the landlord, the full value of the growing crop, which includes straw as well as grain. It is plain therefore that the plaintiffs have placed themselves in the mischief which the act intended to repress, without having entitled themselves to the remedy which the act intended to provide. They are the purchasers of goods and chattels; they claim, by the damages which they seek, the right of disposing of the straw of those crops as their own absolute property, and the landlord has no remedy for the injury thus done to his land, unless that construction is put upon the act for which the defendants contend, namely, that its provisions are obligatory; and the purchasers not having shewn that they have complied with them, their title is not complete against the landlord.

On the part of the plaintiffs, the argument upon the statute is, that its provisions are obligatory upon the *sheriff* only; and that it never could be intended that the purchaser should be bound to see that all its various minute provisions had been complied with, many of which he could not ascertain with certainty. And a sale under this statute is likened to a sale under the ordinary process of the Court, in which case it is clear the purchaser would not be prejudiced by any irregularity in the process or mode of execution.

This argument rests upon two grounds, each founded on a fallacy. First, the provisions of the statute cannot be likened to the rules and regulations of this Court. In the

latter case, third parties are not affected by them, because a knowledge of them, and consequently of their having been complied with or not, is confined to the parties before the Court and the particular officer engaged in executing its process; whereas in the former, a knowledge of the regulations, these being prescribed by statute, is presumed in all persons. Secondly, when it is said that the provisions of the statute are obligatory upon the purchaser, it is not intended that he is bound to see to the performance of those acts which it is by the act made the exclusive duty of the sheriff to perform, (as there directed by sections 2 and 5,) but merely that he must shew that he has complied with that provision of the statute which relates to *himself*. The 3d section is so framed, that it is not made more the duty of the sheriff to take the agreement, than the duty of the purchaser to enter into it. And if the clause is obligatory upon the sheriff, which seems admitted by the argument, it must be obligatory upon the purchaser also. And moreover, the agreement is an act which the purchaser must know of, and have the means of proving.

But if the Court should be of opinion that this does not affect the plaintiffs, it is then submitted that the land-
 lord had a right to distrein upon the crops in question, notwithstanding the previous sale, they being upon the premises at the time the rent distreined for became due.

In answer to this argument the plaintiffs rely upon *Peacock v. Purvis*, in which case undoubtedly the contrary was decided.

But the present case ought not to be decided by *Peacock v. Purvis*, for two reasons. 1. Because in this case the construction of 56 Geo. 3, c. 50, is necessarily involved; whereas in that case the statute was not alluded to either in the argument or in the judgment. 2. Because that case proceeds upon a misapprehension of the authorities, and, as regards its application to the present case, is opposed to principle and convenience. The main foundation of the judgment in *Peacock v. Purvis* rests upon the position that

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goods in the custody of the law cannot be distrained; and for this position the judgment in *Eaton v. Southby* (a), and a passage from *Co. Litt.* 47 a, are adverted to as conclusive authorities. There is no case in the books directly establishing the position in question, though its existence has frequently been assumed; *Blades v. Arundale* (b); *Woolfall's Landlord and Tenant*, 389 (c); *Com. Dig. Distress* (C.); *Finch's Law*, 28. But on examination it will appear that all these authorities refer immediately or ultimately to the passage in *Co. Litt.*; which is as follows: "Valuable things shall not be distrained for rent, for benefit and maintenance of trade, which by consequent are for the commonwealth, and are there by authority of law, as a horse in a smith's shop shall not be distrained for rent issuing out of the shop, nor the horse &c. in the hostery, nor the materials in the weaver's shop for making of cloth, nor cloth or garments in a taylor's shop, nor sacks of corn or meal in a mill, nor in a market, nor any thing distrayned for damage feasant, for it is in custody of law, and the like." In this passage, the exemption is intended to apply only to the goods of third persons, which under particular circumstances happen to be upon the premises of the tenant,—in no case to the goods of the tenant himself. The latter part of this passage, (which has been considered as an authority for the general position, that goods of the tenant in the custody of the law cannot be distrained,) plainly refers only to the goods of third persons, which having been seized damage feasant, are detained upon the premises, the reason of their exemption being that they are there, not by the will or act of the owner, but in the custody of the law, and liable to be replevied and returned. Moreover, this general position is denied by the several decisions in bankruptcy, where it has been held that goods seized by the messenger, or taken possession of by the assignees, though in each case as much in the custody of the law as goods seized in execution, are not protected from the landlord's distress;

(a) Willes, 131.

(b) 1 Maule & Selw. 711.

(c) *Post*, 801.

Ex parte Plummer (a), *Ex parte Jacques* (b), *Ex parte Dillon* (b), *Ex parte Grove* (b). And the case of *Parslow v. Cripps* (c), which was cited in *Peacock v. Purvis*, but not adverted to in the judgment, is the other way. [Taunton, J. *Parslow v. Cripps* is no authority; there was no judgment of the Court, and the report seems to contain only the arguments of counsel.] Further, it is said, that as a consequence of the exemption from distress of goods in the custody of the law, goods sold under an execution will be protected, unless they remain unnecessarily upon the premises after they might have been removed; and therefore that goods so sold, which at the time of the sale are not *in a state* to be removed, for instance, growing crops, will be protected until they become fit for removal. And this is the simple point decided in *Peacock v. Purvis*. Now it being conceded that goods sold under an execution, and *unnecessarily* left upon the premises, are liable to the landlord's distress, it is submitted, that the circumstance of their being *unfit for removal* at the time of the sale ought not to exempt them from distress, while remaining upon the premises for the purpose of arriving at maturity, but *à fortiori* ought to *make them* liable to distress. In the case of goods unnecessarily left, the ground of their liability to distress is the extensive nature of the landlord's common law remedy for his rent; his right to take as a pledge the inducta et illata upon the land. There is no circumstance which upon any principle applicable to the law of property, could originate this right. The delay in the removal may be merely accidental, and the purchaser does not thereby derive any benefit, nor does the landlord sustain any loss. [Taunton, J. *At common law* the landlord has no power to distrain *growing crops*; his right is by stat. 11 Geo. 2, c. 19, s. 8.] That is undoubtedly so; but the statute gives the power of distress as to growing crops, in the same form and to the same extent as it existed at common law as to goods and chattels. But to continue the

(a) 1 Atk. 103.

(b) *Ib.* 104.

(c) 1 Com. Rep. 204.

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argument. In the case, however, of goods necessarily left upon the premises, because unfit for removal, as grown crops, it is plain that by the occupation of the land while the crop is ripening, the purchaser requires and receives a benefit which the landlord gives, and which he cannot withhold. Can it then be consistent with principle, that the existence of circumstances, which prove a benefit received on the one side and conferred on the other, should be made a reason for taking away a right of property which but for those circumstances would be unquestioned? As to the argument that the purchaser buys the crop, and it is of no value unless it remain to ripen, the answer is, that the purchaser buys an *unripe* crop, and cannot acquire a greater interest in it than the tenant had, and in his hands it was clearly distrainable. Moreover, it is apparent that the legislature did not understand the law to be as contended for on the other side. By the 6th section of the 56 *Geo. 3*, c. 80, it is enacted, that where any purchaser shall have entered into the agreement required by the 3d section, the landlord shall not distress any crop sold *subject to such agreement*, which at the time of the sale was *severed from the soil*. Why this partial exemption of crops, sold *subject to the agreement and severed at the time of sale*, if by law every crop, whether severed or not, whether sold subject to agreement or not, is not distrainable? This provision is plainly nugatory, if the law be as contended for.


Further, the doctrine in question is violently opposed to convenience. By 8 *Ann.* c. 14, s. 1, the landlord, in cases of execution, is only entitled to receive from the sheriff arrears of rent not exceeding one year, *due at the time of the seizure*; for rent which may become due *during* his possession, the sheriff is not liable; *Hoskins v. Knight (a)*, *Gwilliam v. Barker (b)*. Suppose this possession to be continued, by the consent of the tenant (as it may be done, *Blades v. Arundale (c)*), for a twelvemonth, or any other given period,

(a) 1 Maule & Selw. 245.

(c) 1 Maule & Selw. 713.

(b) 1 Price, 274.

the sheriff is not liable for the subsequent rent; and according to the doctrine contended for, the goods being all the while in the custody of the law, could not be distreined. Again, suppose the case of a triennial crop, for instance, *teazles* (a); if this crop were seized and sold immediately upon its being put into the ground, the landlord would in effect be prevented from resorting to the produce of the land as a security for his rent, for the space of two years at least. In the present case, the landlord's remedy by distress is virtually taken away for a year, if the sale to the plaintiffs be protected as contended for.

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N. R. Clarke, in reply. The great inconvenience which it is said the landlord will be exposed to, in not having a remedy against his tenant, is an inconvenience which a landlord suffers with other creditors. No authority has been cited which militates against the decision in *Peacock v. Purvis*. The argument for the defendant has been confined to the *inconvenience* resulting from that decision, which it is said is founded upon a passage in *Co. Litt.* Whether the passage in *Coke upon Littleton* does or does not sustain the position, that goods taken in execution are in the custody and under the protection of the law, and therefore cannot be distreined for rent, is immaterial, as that position is absolutely established by a variety of other authorities. The purport of the 6th section has been entirely mistaken. That section provides that the landlord shall not distrein for rent on crops purchased, and which are severed from the soil, and which the purchaser has agreed to consume on the land. Had it not been for this section, the landlord would have had the power to distrein the crops as soon as they had arrived at maturity, and the purchaser would have been deprived of that which he had purchased. The operation of this section is confined to the case where the landlord has protected himself by a written agreement. Where there is no written agreement,

First point.

Second point.

(a) As to which crop, see *Graves v. Weld*, *ante*, ii. 725, 727, 736.

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the sheriff at common law has a power to sell. The power of sale is not given by any statute. There is no pretence for saying that this case is within the statute. Here, we find no written contract, nor is there any custom obliging the tenant to expend the produce on the farm. It is said that such is *universally* the custom of the country. No such custom has been found, nor was there any evidence of such a custom at the trial. It is urged that the landlord in this case is wholly without remedy. In the majority of cases the landlord will have a complete remedy against the sheriff, in case he does not comply with the requisitions of the statute.

LORD DENMAN, C. J., after stating the question, said,—*Peacock v. Purvis* is expressly in point, and there is no material distinction between that case and this. It is singular that the statute 56 Geo. 3, is not mentioned by the counsel in that case. Probably the reason was, that they thought that it did not bear upon the question then before the Court. If so, I think they were right. As *Peacock v. Purvis* is an authority directly applicable to this case, the plaintiff is entitled to the growing crops.

LITLEDALE, J.—Upon the authority of *Peacock v. Purvis*, without considering the general propositions which have been advanced, I think the landlord had no right to distrein these crops. By the statute of *Anne* (a), one year's rent must be paid by the party at whose suit an execution issues. When that act passed, the landlord had no right to distrein growing crops. The 11 Geo. 2, c. 19, s. 8, gave him that privilege, and effectually protected all *executions* against the distress which is first given by that statute. It is said that *Peacock v. Purvis* is not an authority, because 56 Geo. 3, c. 50, was not adverted to. I agree with my lord, that the statute of 56 Geo. 3 is not applicable to that case. That statute enacts, that the sheriff shall not carry

(a) 8 *Anne*, c. 14.

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off any straw of crops growing. It does not appear that the straw in this case has been removed; and I cannot admit the *sale* to be a *carrying off* within the meaning of the statute. The act was certainly intended for the benefit of landlords. The landlord, however, has exercised his right of distress on these goods once, and has therefore no further right over them.

TAUNTON, J.—I am of opinion that by virtue of the sale the purchasers are entitled to the crops, discharged from the right of distress for rent due after the crops were seized in execution. With respect to the 56 *Geo. 3*, c. 50, I am of opinion, for the reasons given by my brother *Littledale*, that that statute has no application to the present case. This question was decided by *Peacock v. Purvis*. It is somewhat curious that the report in that case states that the case resolves itself into a question never before decided. But it so happens, that although not decided, a very strong opinion was thrown out in *Eaton v. Southby*. In *Woodfull's Law of Landlord and Tenant*,—the first edition, published in 1802,—this question is stated to have been decided. About nineteen out of twenty of the positions in that work are unsupported by authority. I have looked into the reports of the King's Bench and Common Pleas, and I can find no trace of any such decision. Yet Mr. *Woodfull* was not likely to have *invented* this (a).

WILLIAMS, J.—At the time when the execution was levied, all the rent then due had been paid. Corn growing remains on the land from the necessity of the case. It would be utterly destroyed if it were removed. The authority of *Peacock v. Purvis* appears to be unimpeached, and I think that it governs this case.

Postea to the plaintiff.

(a) *S. P. Southby v. Eaton*, M. per *Palmer*, arg.; *Eaton v. Southby*, 3 *Geo. 2*, Gilb. Distress, 3d ed. 50. M. 12 *Geo. 2*; Willes, 131; 7 And see H. 21 *H. 7*, fo. 2 b, pl. 1, Mod. 251; *suprà*, 796.

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The KING v. The Justices of the WEST RIDING of
YORKSHIRE,—in the matter of the AIRE and CALDER
NAVIGATION.

Where an act of parliament, enabling a Company to make certain canals, &c. directs that questions of compensation, &c. shall be tried by a jury, before the justices at quarter sessions, and expressly takes away the certiorari, and a subsequent act, enabling the Company to make certain other canals, directs that the former act, and all

powers, provisions, exceptions, rules, remedies, regulations, penalties, forfeitures, articles, matters and things therein contained, shall be in full force, and shall extend to and be used, executed, applied, enforced and put in execution, to all intents and purposes, as to that act and the several matters and things therein contained, for making and maintaining the canals, &c. to be made by virtue of that act, and for carrying the several purposes of that act into execution in as ample and beneficial a manner, to all intents and purposes, as if the same had been respectively re-enacted in the body of that act:—Held, that the clause taking away the certiorari must be considered as embodied in the latter act.

And in such case the Court will not grant a mandamus to the justices or clerk of the peace to enter up judgment upon the verdict of a jury otherwise than in the terms in which it is given by the jury, even though it appear by affidavit that in considering the amount of damages to be assessed by them, they took into consideration matters not properly within their jurisdiction.

So, though it should appear upon the face of the proceedings that the jury have assessed separate damages in respect of matters foreign to their jurisdiction.

But such a finding would be a *nullity*, and could not be enforced.

Whether, where an act for making canals, &c. authorizes the summoning a jury, "to ascertain what sum and sums shall be paid by way of recompense either for the damages before that time sustained, or for the future temporary or perpetual continuance of any recurring damages occasioned, and the time or occasion of which shall have been only in part obviated, repaired or remedied, and which can or will be no further remedied or repaired," the jury can assess compensation in respect of *prospective* damages, where no previous damage has been sustained, *quære*.

SIR James Scarlett, in last Trinity term, obtained a rule calling upon the justices and clerk of the peace of the West Riding to shew cause why a writ of *certiorari* should not issue to remove into this Court the judgment pronounced by the said justices at the last Christmas general quarter sessions, upon the verdict of a jury impanelled before them under the provisions of 9 Geo. 4, cap. xcvi. —or why a mandamus should not issue, commanding them to *make up the same conformably to the legal effect of the said verdict* and of the said statute, by striking out so much thereof as relates to the recompense thereby assessed and ascertained in respect of prospective damages.

In the affidavits upon which the rule was obtained and the affidavits in answer, the following facts were stated:

By 9 Geo. 4, cap. xcvi. the Undertakers of the Aire and Calder Navigation were authorized to make (*inter alia*) a

certain tram-road, and were authorized to enter any lands required for that purpose, making satisfaction, in the manner therein mentioned, to the owners and all persons interested in the lands &c. taken or prejudiced, for all damage sustained through the execution of the powers granted to the Undertakers. In case of a dispute as to the amount of such purchase money or compensation, the Undertakers were required (sect. 20) to issue a warrant to the sheriff, commanding him to return, and the sheriff was required accordingly to return, a jury to appear at a court of general quarter sessions to be holden for the county &c. in which the lands should lie or the dispute arise; and such jury were "to inquire of, assess, and ascertain the sum or sums of money to be paid for the purchase of such land, &c., and also what other separate and distinct sum and sums should be paid by way of recompense either for the damages which should *before that time have been sustained as aforesaid, or for the future, temporary or perpetual, continuance of any recurring damages which should have been so occasioned as aforesaid, and the time or occasion of which should have been only in part obviated, repaired or remedied by the said Undertakers, and which could or would be no further obviated, repaired or remedied by them.*" And the justices were directed to give *judgment* accordingly for such purchase money or recompense as should be assessed by such jury; which said *verdict* and the *judgment* to be thereupon pronounced *should be binding and conclusive against all bodies politic, corporate, or collegiate, and all other persons whatsoever.*

By a previous act of 1 Geo. 4, c. xxxix., passed for the purpose of enabling the Undertakers of the Aire and Calder Navigation to make certain new cuts, it had been enacted (s. 117) that no proceedings to be had and taken in pursuance of that act should be quashed or vacated for want of form, or *be removed by certiorari or any other writ or process whatsoever* into any of his majesty's courts of record at Westminster or elsewhere.

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The KING
v.The JUSTICE
of the Peace
Riding of
YORKSHIRE:

1854.

The KING
v.The JUSTICES
of the West
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By the 1st section of the 9 *Geo.* 4, c. xcvi. it was enacted, that the act of 1 *Geo.* 4, c. xxxix., and all powers, provisions, exemptions, rules, remedies, regulations, penalties, forfeitures, articles, matters and things whatsoever, therein contained (with certain exceptions), should be in full force and effect, and should extend to and be used, executed, applied, enforced and put in execution, to all intents and purposes, as to that act and the several matters and things therein contained, for making and maintaining the cuts, canals, &c. to be made by virtue of that act, and for carrying the several purposes of that act into execution, in as ample and beneficial a manner, to all intents, constructions and purposes whatsoever, as if the same had been respectively repeated and re-enacted in the body of that act and made part thereof.

The course of the projected rail-way or tram-road of the Undertakers intersected a rail-road belonging to the Lake Lock Railway Company, and was proposed to be carried under it by means of a tunnel. The Undertakers and the Company not being able to agree upon the sum to be paid to the latter for a piece of land required by the Undertakers (being a small portion of the land under their rail-way) and for any damage that might accrue to them, a jury was returned for the purpose of ascertaining the amount, and appeared and were sworn at the last Christmas sessions for the West Riding of Yorkshire, when, it being urged by the counsel for the Company and strongly insisted upon by the chairman, that the Undertakers would have it in their power at any time entirely to destroy the Company's rail-road by making a chasm at the place where their tram-road ran underneath the rail-way of the Company, the jury gave a verdict as follows:

"The eight perches of land we value at . . . £6 0 0 .

Present damages Nothing.

Future damages £2800 0 0"

To this last finding the counsel for the Undertakers immediately objected, as illegal and beyond the authority given

by the act; but the chairman received the whole verdict, and delivered the judgment of the court in conformity therewith. The judgment, as entered by the clerk of the peace, states the finding of the jury as to past damages thus—"And do also ascertain that *no* separate and distinct sum of money shall be paid by way of recompense to the said proprietors for the *damages before this time sustained* by the execution of any of the powers granted in and by the said act;" and it is an entire judgment, awarding the payment by the Undertakers of 2800*l.* in one sum forthwith. The Undertakers have demanded an abstract of title, and tendered the 6*l.* for the purchase of the land; but the abstract has not been delivered, and the 6*l.* was not accepted.

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Blackburne and *Dundas* shewed cause. This application divides itself into two parts; the prayer for a certiorari, and that for a mandamus.

I. With regard to the first point, it is not necessary to say more than that the certiorari is expressly taken away by the 117th section of 1 *Geo.* 4, c. xxxix., and that the provisions of that section are clearly imported into the 9th *Geo.* 4, c. xcvi. by the 1st section of the latter act.

First point:
 Certiorari.

II. With respect to the mandamus, it is difficult to understand what is meant by entering up the judgment "according to the *legal effect* thereof;" but from the tenor of the affidavits, it is obvious that the object of the motion is to have the *decision of the jury, as to the amount of damages, reviewed by this Court.* [Sir *Jas. Scarlett*, contra, stated that he should contend that the verdict could not legally operate as a finding for more than 6*l.*, as the jury had *no power* to assess *any* damages in respect of any prospective or *recurring* injury, except in cases where some damage *had previously* been sustained.] By the 20th section of 9 *Geo.* 4, c. xcvi. it is enacted, that the jury shall inquire of, assess and ascertain the sums to be paid for the value of the lands, &c. required to be taken by the Undertakers, and also what separate and distinct sum

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and sums shall be paid by way of recompense *either* for the damages which shall have been previously sustained by the execution of any of the powers contained in that act, or for the *future* temporary or perpetual continuance of any recurring damage, which shall have been occasioned as aforesaid. Such verdict of the jury, and the judgment to be pronounced thereupon by the justices, is to be *binding and conclusive to all intents and purposes, and against all persons, whatsoever*. It is manifest from this section that the jury have authority to assess damages in respect of injuries, past or future, independently of each other, and that it is intended that there shall be no appeal of any kind against their finding, upon matters within their jurisdiction. This enactment, making the verdict and judgment conclusive as against all parties, must be taken to have been introduced by the Undertakers for their own benefit, and therefore ought to be construed strictly against them. It is clear as matter of fact, that the Railway Company would necessarily sustain *some* damage; and the question, whether more or less than the jury have found would best meet the justice of the case, certainly cannot be entertained by this Court. The 27th section, which is engrafted on the 20th, aids that construction of the 20th section which would give the jury, under it, jurisdiction over three separate and distinct things; namely, the value of the land, damage actually sustained, and damage merely prospective. That section requires the jury to find the value of lands, &c. separately and distinctly from any damage sustained or *to be* sustained as aforesaid, and to distinguish the value set upon lands, &c. and the money assessed for such damages as aforesaid separately and apart from each other. The Court therefore has no authority to interfere either by issuing a certiorari to remove the proceedings, or by granting a mandamus to the justices requiring them to alter the judgment.

Sir J. Scarlett, F. Pollock, Milner, Wightman, and P. Heywood, *contra*. The question before the Court mainly

depends upon the 20th section of 9 Geo. 4, c. xcvi. ; and upon that section it is confidently submitted that a jury, summoned under the powers of the act, have no jurisdiction to assess *future* damages of any kind, except in cases where past damage, resulting from the execution of some of the powers of the act, is found. The material words are, " or for the future temporary or perpetual *continuance* of any *recurring* damages which shall have been so occasioned as aforesaid, and the cause or occasion of which shall have been only in part obviated or repaired by the said Undertakers, and which can or will be no further obviated, repaired or remedied by them." It is obvious that these words do not point to any *speculative* damages, as they may be called, which the Undertakers may *possibly* at some *future* time occasion to those parties whose lands they require for the purposes of the act ; and it is equally obvious that they *do* point to a *recurrence* of such damage already in part sustained as not only has not been, but cannot or will not be "*obviated, repaired or remedied* by the Undertakers." The damage must be *ejusdem generis* with damage which has already *occurred*, and must be such as is likely to *occur again*, from some act already done by the Undertakers. Suppose that in the course of their works the Undertakers had been obliged to stop up some drain which was necessary in times of flood to prevent the lands in the neighbourhood from being overflowed, and that they had not, and could or would not, obviate this cause of injury ; until a flooding of the land had *occurred*, the jury would have no jurisdiction to give compensation ; but when damage had once been occasioned, *then* the jury would be authorized to give compensation to the owners of the lands which had been flooded, both for the damage which had *occurred* and for the probable *recurrence* of it. It cannot in *this* case be said that any act has been done by the Undertakers which has occasioned damage, and is calculated to produce future damage, to the Railway Company—that any act has been done by the Undertakers, which, in spite of their endeavours to obviate

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it, *must* occasion a future perpetual or temporary recurrence of an obstruction of the Company's road, for they have not even entered on the Company's land. The word "*recurrence*" means the *occurrence again* of damage which has occurred before. As soon as any damage has been sustained by the Company, they may require compensation in respect of such damage; and if the Undertakers cannot, or will not, take effectual measures for preventing the recurrence of the damage, the jury may award compensation for the future damage which is likely to result from the same cause. If the construction which has in this argument been put upon the clause be the correct construction, then it follows that the jury had no jurisdiction to award the sum of 2800*l.* in respect of future damages, (as they have done,) and that consequently their verdict, to that extent, is a nullity. With regard to the language of the 20th section, which directs that the verdict and the judgment thereon shall be "*binding and conclusive against all bodies politic, corporate or collegiate, and all other persons whatsoever,*" it is evident that the words are used *diverso intuitu*, and for the purpose of making the verdict and judgment binding against all persons who, *from their character*, would not otherwise be bound by them,—as infants and married women.

First point.

The next question is, as to whether this Court can interfere for the purpose of seeing that justice is done between the parties, and in what manner—whether by certiorari or mandamus. And first, with respect to the *certiorari*. Undoubtedly the certiorari is taken away in express terms by the *first act*; but by *express negative words alone* can this Court be ousted of its general jurisdiction over inferior courts; and the question therefore must be, whether, by the 1st section of 9 *Geo. 4*, c. xcvi. the section in 1 *Geo. 4*, c. xxxix. taking away the certiorari, is imported into 9 *Geo. 4*, c. xcvi. From the language of the 1st section of the latter statute, it appears at the least *doubtful* whether, when the *purpose* of the enactment is stated to be "for

making, completing, preserving and maintaining the cuts, canals, &c. to be made by virtue of that act, and for carrying the several purposes of that act into execution," the Court must of *necessity* infer that the clause was intended to have the effect of taking away the certiorari, on a question relating to damages occasioned by the execution of that act. The Court will be slow in making such an inference. *Rex v. Mark Territ (a)*, *Rex v. Abbott (b)*, and the observations of Lord *Mansfield* in the latter case.

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But, assuming that the Court are of opinion that they cannot issue the certiorari in this case, it is hoped that they will supply the defect by granting a mandamus. In many cases where the writ of certiorari is taken away, the Court will, by mandamus directed to the justices or the clerk of the peace, require proceedings before the court of quarter sessions to be entered conformably to their *legal effect*. Now the legal effect of the verdict given by the jury in this case is, that they find 6*l.* to be the value of the land, and find *nothing* for damage done. If the verdict had been entered according to the fact, it would have stood thus:— We find the value of the land to be 6*l.*; we find *no past damage* whatever; we find for *recurring* damages 2800*l.*;— and then the finding of 2800*l.* for recurring damages would have appeared upon the face of the proceedings to be a mere nullity. In the entry the jury are made to say that they find "that no separate or distinct sum of money shall be paid by way of compensation for *the damage before this time sustained*;" from which it might be inferred that they thought that damage *had* already been sustained, but that the Company were not entitled to any compensation in respect of it. Therefore, as the entry stands, the finding of 2800*l.* for *recurring* damages may be considered as supported by the finding as to *past* damages, and consequently, unless the Court can order the judgment to be entered according to the legal effect of the verdict, the Undertakers

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(a) 2 T. R. 737.

(b) 2 Dougl. 553.

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are without remedy. Suppose the jury had assessed damages at 10*l.*, and the justices had directed it to be entered 20*l.*, and it had been so entered—would not this Court have interfered? If they would grant a mandamus in such a case, may they not do so when the justices have directed a verdict, which was a nullity, to be so entered up as to give effect to it?

First point.

Lord DENMAN, C. J.—The first question is, whether the certiorari lies in this case; and upon examination of these acts of parliament, I think that it does not. The 117th section of 1 Geo. 4, cap. xxxix. takes it away in the strongest and most direct terms; and the act under which the present proceedings took place embodies, to the fullest extent, all the provisions and regulations of the former act. It cannot be said that the words, “powers, provisions, exemptions, rules, remedies, and regulations,” and “articles, matters, and things whatever,” do not include the provisions of the 117th section of the former act.

Second point.

The next question is, whether we can supply by mandamus that which we cannot touch by certiorari; and certainly, when the rule was moved for, the extraordinary circumstances of this case made the Court extremely desirous, if possible, of correcting the error into which, they had reason to believe, the jury had fallen. But we must take great care that we do not, by a kind of side-wind, repeal the clause which takes away the certiorari; and I think we should be in great danger of doing so, if we were to grant a mandamus in the manner prayed. Most certainly we cannot interpose unless it distinctly appear that the jury have done something which they had no authority whatever to do. Supposing that they have done so, it may have been done in one of two ways;—either they may have given an increased amount of compensation, on account of some injury, real or imaginary, of which they had no right to take cognizance, (and in such case I think it quite clear that we could not interpose to reduce the damages,)—or

they may have assessed separate and distinct damages in respect of something clearly not within their jurisdiction,—in which case the finding would, to that extent, be a mere nullity, and would call for no interposition on the part of this Court. In either view of the case, therefore, I think we cannot interfere. If the finding of £2800*l.* does appear upon the face of the proceedings to be a nullity, the payment of that sum cannot be enforced. I would, however, be understood as giving no opinion as to whether this finding is a nullity upon the face of it.

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LITLEDALE, J.—I have no doubt whatever that the First point.

certiorari is taken away as to proceedings under the second act. I do not very well see what stronger words could have been used for the purpose of embodying in one act all the provisions of a former act, than those which are used in the first clause in the act of 9 *Geo. 4*, c. xcvi. Mr. *Dealtry* has referred me to the case of *Rex v. Fell* (a), which is directly in point. The object of taking away the *certiorari* is to prevent this Court from questioning the correctness of the proceedings of the court below; and if we were to grant a *mandamus* to the justices to enter up judgment according to the legal effect, we should, by a side-wind, get rid of the clause which takes away the *certiorari*. But, independently also of that consideration, I think this Court

Second point.

has no jurisdiction whatever to order the justices to enter up judgment according to the legal effect of the verdict; for that would be a direction to the justices to do a thing contrary to the act of parliament, which requires them to give judgment for such purchase money and recompense as shall be assessed by the jury. If the assessment of these future damages be void, it will be void to all intents and purposes, and the justices may treat it as a mere nullity; but I do not mean to give any opinion as to whether the jury were authorized in giving recompense for such future damages. That question may be the subject of considera-

(a) 1 Barn. & Adol. 380.

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tion on some future occasion. I am quite clear that we cannot interpose either by way of certiorari or by way of mandamus.

TAUNTON, J.—I have not the slightest doubt that the certiorari is taken away. On the other question my mind has fluctuated in the course of the discussion. I see no mode of proceeding that is not open to serious objections; and that being the case, I think the safest course is to leave things as they are. If the finding be wrong for the cause suggested, and the vice appears upon the face of the proceedings (upon which I give no opinion), it will be impossible for any party to enforce it, and the defect may be taken advantage of at any future stage of the proceedings.

WILLIAMS, J.—I am entirely of the same opinion. I hope it may be that this finding is a nullity; but that is not the question which we are now to discuss. The question for us to consider is, whether either of the remedies proposed can be granted by us; and I think that they cannot. The certiorari is, I think, clearly taken away by the second act; and with respect to the mandamus, I think that there are most serious objections to it. In the first place, I think we cannot require the justices to do a specific act, but can only set them in motion where they have neglected or refused to entertain a matter which they ought to have considered; and in the next place, I do not see how one set of justices, at sessions, can take upon them to revoke or to call in question the decision of another set of justices, at a previous sessions. I am not aware of any such power.

Rule discharged.

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EJECTMENT for land at Newington, Surrey. The cause was referred to a barrister, who, upon the face of his award, raised a question as to the validity of a fine levied by one *Robert Stafford*, by finding as follows:—

“I find, that at the time of the levying of the fine herein-after mentioned, one *Robert Stafford*, through whom the defendants claim, had been and was a disseisor in possession of the premises, and, being so in possession, levied a fine in the Court of Common Pleas, the chirograph of which fine was in these words,—(the award then set out the chirograph, which bore date—‘*In three weeks of the Holy Trinity, 9 Geo. 4.*’) And I further find, that an examined copy of the proclamations of the said fine was produced before me upon the said reference, by which it appeared, that the first proclamation was made the *twenty-first day of June, in Trinity Term, 9 Geo. 4.* (The award then stated the days in the three following terms, in which the 2nd, 3rd, and 4th proclamations were made.) And I do further find, that the date ‘*In three weeks of the Holy Trinity, 9 Geo. 4.*’ mentioned in the said chirograph, was on the *twenty-third day of June, and in Trinity term,*” (*i. e.* two days after the date of the first proclamation.) The award then concluded by stating, that the arbitrator decided in favour of the *defendants*, upon the assumption and supposition that the fine had been duly levied, and *the proclamations thereof duly made*; and that if he had not assumed and supposed that the fine was a valid fine with proclamations duly levied, he should have determined the cause by awarding in favour of the lessors of the plaintiff.

Follett, on behalf of the lessor of the plaintiff, obtained a rule nisi to set aside the award, and enter a verdict for the plaintiff,—or to refer the matters in dispute back to the arbitrator,—on the ground, that, upon the facts found, the arbitrator should

The Court refused to set aside an award, on the ground that the decision of the arbitrator purported to be founded upon a title derived through a fine with proclamations, where the first proclamation had been made before the *en-grossment* of the fine.

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have awarded in favour of the lessor of the plaintiffs, and that the fine was not properly levied.

An affidavit in opposition to this rule stated as follows:—The deponent had inquired at the office of the chirographer of the Court of Common Pleas, who is the officer appointed to engross all fines levied in that court, and who makes all the proclamations thereon, as to the regularity of the fine and proclamations; and, in answer to such inquiries, was informed at the said office, that both the fine and proclamations in question were *quite regular*, and that the said fine had been levied and the said proclamations made in strict accordance with the practice which had prevailed in that office, from the earliest recollections of the oldest persons in it, and in like accordance with the practice which appeared from the books and records of the office, to have *prevailed from the time of the passing of 31 Eliz. c. 2.* The deponent was further informed, that the practice had been, from the passing of the said statute, to proclaim *two fines* in each term *in the name of all the fines* levied in—or as of—the same term, and to proclaim the *same two fines* in like manner in each of the three next succeeding terms; and that the *first proclamation* had always from the passing of the said statute been made without regard to the fact whether or not the fine *had been engrossed*, or the writ of covenant was before returnable, and that it was considered, in the office, perfectly *immaterial whether the first proclamation was before or after the fine was engrossed*, provided it was made in the same term in which it was engrossed; and that the first proclamation was *frequently made before* the fine was engrossed or the writ of covenant returnable, and that no objection had ever been taken to that mode of making the first proclamation. There was also an affidavit by the chief proclamator, which stated, that the practice had always been as above-stated during all his time, which comprehended a period of nearly forty years.

Tomlinson now shewed cause.—This court will, before

deciding upon the question, inquire of the Court of Common Pleas as to the practice with respect to proclamations. Undoubtedly, here the first proclamation was made two days before the date of the chirograph, which is always the day of engrossing it; and, it may be admitted, that if this were an entirely new case upon a statute lately made, or upon which there had not been an established rule of practice, it might be requisite to show that the first proclamation had been made *after* the engrossing of the fine; but it appears, by the affidavit, that the practice has uniformly been (upon a lax construction of the statute of *Elizabeth*), to proclaim two fines in each term, in the name of all the others, without regard to the date of the chirograph, or the day of engrossing each particular fine. Indeed, in practice, the proclamation has become a mere form, and the Court of Common Pleas has frequently allowed fines levied in vacation, to be entered *as of the previous term*; in which case, it is obvious, that the first proclamation, which in strictness must be made in the same term in which the fine is engrossed, cannot, by possibility, be regularly made *after* the engrossment of the fine. The Court of Chancery has recognized this practice as lawful, and has so far acted upon it, as to compel parties to levy fines in vacation; *Short v. Wood* (a). The Court will disturb an endless number of titles, if they decide that this fine is invalid. [*Taunton, J.* Have you looked into Lord Coke's Reading on the statute of fines? (b) He says, "A fine is said to be engrossed when the chirographer makes out the indentures, and delivers them to the parties. But it is not absolutely necessary that a fine should be *engrossed*, provided it be *recorded*, for a fine is a perfect record before it is engrossed."] In *Com. Dig. Fine* (H. 2), it is said, "If a fine was *acknowledged* in Hilary term, and *recorded* in Easter, it may be pleaded—quidam finis se levavit termino Sancti Hilarii; for it was a fine *before the engrossing*."

(a) 1 P. Wms. 470.

the other authorities collected, in

(b) Co. Read. 1. See this and Cruise on Fines, p. 42 et infra.

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[*Taunton, J.* There is a case (a) in 4 *Leon.* 96, and *Dyer*, 254, a., which shews that a fine may be engrossed at any time after it is levied.] The defendants may securely rest their case upon the uniformity of the practice for more than two centuries, coupled with the fact, an assumption of which cannot be avoided, that the Court of Common Pleas have sanctioned that practice, by allowing fines to be entered of record, the proclaiming of which had been made indifferently before or after engrossment.

Follett, contrâ. There was no *concord* duly acknowledged between the parties until the 23rd day of June. *Shepherd's Touchstone* (b) shows what is meant by the *engrossing* of a fine, namely, the making, by the chirographer, of the indentures of the fine, and delivering them to the party to whom the conusance is made. This authority, and that which has been cited by Mr. Justice *Taunton* from Lord *Coke's* Reading, shew, that until the engrossing of the fine, there is no chirograph; and until there is a chirograph the fine is not complete. But the question turns entirely upon the statutes of fines. The language of 1 *Ric.* 3, c. 7, is perfectly plain, to show that under that statute the proclamation was required to be *after the engrossing* of the fine. That statute enacts, that "*after the engrossing* of every fine, it shall be read and proclaimed in open court the same term, and in three terms then next following the *same engrossing*, in the same court, at four several days in each term;" and enacts, that *after the proclamations done and certified*, the fine shall conclude parties, privies, and strangers. The other statutes in *pari materiâ*, as the 4 *Hen.* 7, c. 24, are equally plain upon this point, and shew that the *proclamations* are to be *subsequent* to the engrossment. The statute of *Elizabeth*, upon which this vicious practice has arisen, makes *no alteration* in the law relating to the *proclamations* of a fine, except as to the number of proclamations to be made in each term. That

(a) Sir *J. Brome's* case.

(b) *Shep. Touchst.* 3.

statute makes one proclamation of *each* fine in the term in which it is levied and the three subsequent terms sufficient; whereas, it had previously been necessary to proclaim each fine four times in each of the four terms. The language of that act directly negatives the supposition that it was intended to make one general and nominal proclamation sufficient for *all* the fines levied in the term, whether engrossed before or after that proclamation. No authority can be found upon the point, so as to aid the Court in coming to a decision, (for *Doe v. Harrison* (a) is not in point here.) The question, therefore, is left entirely upon the acts of parliament, which cannot be opposed by a practice unwarranted by any decision. [Lord Denman, C. J. Do you say, that any of the statutes expressly enacts that the fine *shall be engrossed*?] No: but that it is required, that it shall be proclaimed *after* engrossment.

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Cur. adv. vult.

On a subsequent day in this term, the judgment of the Court was delivered by Lord DENMAN, C. J., who, after stating the award, and that portion of the affidavit which contained the officer's account of the practice, proceeded as follows:—

The question in this case turns upon the validity of the fine. The objection to which was, that the chirograph bore date, "In three weeks of the Holy Trinity, 9 Geo. 4," which fell on the 23rd day of June, and that the first proclamation was made the 21st day of June. This was said to be bad under 4 Hen. 7, c. 24, which directs, that *after* the engrossing of every fine, the same shall be read and proclaimed in the same court, *the same term, and in three terms then next following the same engrossing* in the same court. And making up the *chirograph* of the fine was, on the authority of Lord Coke, said to be the *engrossing* of the fine (b); and here one of the proclamations was

(a) 3 Barn. & Adol. 764.

(b) Coke's Reading, 1.

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made *before* that took place. On the other hand, the same authority was cited to prove that it is not necessary that a fine should be *engrossed*, provided it be *recorded*, for it is a perfect record before it is engrossed, and that it may be engrossed at any time after it is levied. Without deciding any thing on this point, it is sufficient to observe, that the statute directs the proclamations to be made after the engrossing, and though, in ancient times, certainly, courts were very strict in enforcing, in all particulars, the mode of levying fines prescribed by the statute, yet, when we hear from the affidavit of the officer of the Court of Common Pleas, that, during all his time, comprehending a period of nearly forty years, three-fourths of the fines levied have been levied in the same manner in which this was levied, we must pause before we shake the security of so many titles, by pronouncing this fine to be void. The very length of this usage goes a great way to show that this provision of the statute has been construed to be only directory. *Doe d. Jones v. Harrison* (a) was cited in the argument for the lessors of the plaintiff; but it was upon another point, and though it manifests the inclination of the Court, by every reasonable intendment, to support fines, it cannot be relied on here on either side. The judgment must be, that the rule to set aside the award be discharged.

Rule discharged.

(a) 3 Barn. & Adol. 764.



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In the matter of Arbitration between the SUN FIRE OFFICE
COMPANY and CHARLES WRIGHT.

THIS was a rule calling upon *Wright* to shew cause why an award between the parties should not be set aside. The award had been made by a barrister, appointed as arbitrator under a submission by bonds under the respective seals of *Chas. Pole*, Esq. as one of the managers and on behalf of the Sun Fire Office, and *Chas. Wright*, of Dover, innkeeper, and which submission had been made a rule of court. The conditions of the respective bonds recited, that *Wright* had insured with the Sun Fire Office Company, on, among other things, his stock, utensils and goods in trust in the Ship Inn and offices at Dover only 2500*l.*, and on his *interest only* in the said Ship Inn and offices 1000*l.*, and that he took out a policy to that effect; that whilst the policy was on foot a fire had broken out in the said premises, whereby, it was alleged, *Wright* had sustained a loss in his stock, utensils and goods, and his interest in the Ship Inn and offices, so insured, of 1200*l.* The arbitrator awarded that there was due from *Pole*, as manager &c., to *Wright*, 120*l.* for the loss sustained by fire on the goods in the Ship Inn and offices, and 450*l.* for the loss “sustained in his business as an innkeeper by not being able to occupy the inn and offices during the time that elapsed between the fire and the rebuilding of the said premises.”

One of the grounds of the rule nisi for setting aside this award was, that the supposed interest in respect of which the arbitrator had awarded the sum of 450*l.* was not within the meaning and legal effect of the policy.

R. V. Richards shewed cause. The “interest” which *Wright* had in the Ship Inn and offices consisted in the power to use them in his business as an innkeeper, and therefore the loss sustained by him, by reason of the temporary impossibility of using the premises in the business,

The profits of a business are insurable, but they must be insured *quâ* profits.

Under an insurance by *A.* of his “interest in the Ship Inn and offices,” *A.* cannot recover compensation for the loss of his business as an innkeeper, in the interval between the fire and the rebuilding.

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 FICE COMPANY
 and
 WRIGHT.

falls within the meaning of the policy. Suppose that *Wright* had been obliged to hire and pay for the use of other buildings whilst these premises were being rebuilt,—would he not have been entitled under this policy to call upon the insurers to indemnify him? The loss of business, by reason of his not being able to use the premises, would be equally within the policy. The profits of an innkeeper, arising from the use of his inn, constitute an insurable interest analogous to the freight of a ship. Although the subject-matter of the insurance must be properly described, the nature of the *interest* which the assured has in the subject-matter of the insurance may be left at large. *Crowley v. Cohen* (a), *Flint v. Flemyng* (b).

F. Kelly, contra, was stopped by the Court.

LORD DENMAN, C. J.—It is clear to us that the arbitrator had no authority to award compensation to *Wright* for the loss he had sustained in his business by not being able to occupy the premises. The policy was not intended to cover the *profits* of the business.

LITLEDALE, J.—I am of the same opinion.

TAUNTON, J.—I think that *profits* are insurable, but they must be insured *quâ profits*. A party is not entitled to compensation for loss of *profits* under an insurance of his “interest in the Ship Inn.”

WILLIAMS, J. concurred.

Rule absolute.

(a) 3 Barn. & Adol. 478.

(b) 1 Barn. & Adol. 45.

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DAVIES v. MARY WILLIAMS and others.

SPECIAL case directed from the Court of Chancery for the opinion of this Court :

23 & 24 March, 1800. *Michael Williams* deceased, being seised in fee, did by indentures of lease and release, in consideration of the natural love and affection which he had to *Thomas* and *Mary*, his children by his deceased wife, and for making a provision for them in his life-time, bargain, sell and release certain hereditaments unto *J. W. M.* in fee, to the use of *S. B.*, for 500 years, upon certain trusts for raising 400*l.*, to be paid to *Thomas* and *Mary*, as therein mentioned; and after the expiration or determination of the term, and in the meantime subject thereto, to the use of such person or persons, and for such estate and estates, as the settlor should by any deed or writing to be executed as therein expressed, or by his last will and testament in writing, signed, sealed, published and declared in the presence of, and attested by, three credible witnesses, direct, limit, appoint, devise, give or dispose; and in default thereof and subject thereto, to the use of the settlor for his life; and after his decease, to the use of *Thomas* and *Mary*, as tenants in common in tail, with cross remainders between them in tail, with remainder to the use of the settlor in fee.

February, 1811. *Thomas* died without issue, and without having suffered a recovery, leaving his father (the settlor) and sister him surviving.

1812. The settlor married the defendant, *Mary Williams*, by whom he had five children, the other defendants.

8 January, 1818. The settlor duly made his last will and testament in writing, containing as follows:—" I devise all my real estate, whatsoever and wheresoever, of or to which I, or any person or persons in trust for me, is or are seised or entitled for any estate of freehold or inheritance in possession, reversion, remainder or expectancy, with their and every of their appurtenances thereto belonging: and all

A. settles Blackacre to certain uses, reserving to himself a power of appointment by will. By his will he devises "all his real estate, whatsoever and wheresoever, in possession, reversion, remainder or expectancy." He then devises his leasehold and personal estate, "and all other his real and personal estate, whatsoever and wheresoever." At the time of making his will and also at his death *A.* was seised in fee of Whiteacre, and also of the ultimate reversion in fee of Blackacre:—Held, that the will did not operate as an execution of the power.

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my estate, right, title and interest, and also all leasehold premises whatever, of or to which I or any person or persons in trust for me, am or is or are, or shall or may be, at the time of my decease seised, possessed of or entitled to, for any term or terms of lives or years, with the appurtenances, and all my estate and interest therein, or which I may have therein at the time of my decease; and also all my household linen, plate, furniture, and china, stock in trade, books, debts, sums of money and securities for money, and all other my real and personal estate whatsoever and wheresoever, unto *J. R., T. B. and R. C.*, their heirs, executors, administrators and assigns, upon trust for the benefit of *Mary Williams* and my children by her."

The settlor at the time of making his will, and at his death, continued to be seised of the reversion in fee reserved to him under the limitations contained in the indenture of release, and he died seised thereof, and was seised in fee of a messuage and hereditaments not comprised in the indenture of release.

The question for the opinion of the Court is, whether the will operated as an execution of the power.

Kindersley, for the plaintiff. The effect of the settlement of 1800, was to make a provision for the children by the first marriage, and likewise to give to the settlor a control over the estate. The question is, whether by his will the settlor did dispose of the estate for the benefit of the second family? *Primâ facie* the intention of the will was to provide for the children of the second marriage, who were unprovided for. If the will is not executed in pursuance of the power, those children are unprovided for. One part of the words of the will is this—"I devise all my real estate, whatsoever and wheresoever, of or to which I, or any person or persons in trust for me, am or is or are seised or entitled, for any estate of freehold or inheritance, in possession, reversion, remainder, or expectancy." As the testator was possessed of the reversion in fee of the estate over

which he had the power of appointment, and also of other real estate, this clause would operate to pass *that* property, and would *not* operate as an execution of the power. But the testator afterwards devises all *other* his real and personal estate, whatsoever and wheresoever; and *this* clause, it is submitted, *does* operate as an execution of the power. The testator having by the former clause disposed of all his real property, exclusive of that over which he had the power of appointment, had nothing to pass by the second, except that which was not included in the first clause, and therefore that second clause operated as an execution of the power. If a party be possessed *only* of a power of appointment over land, and by his will devises all his real estate, the will does operate as an execution of the power; *Lewis v. Lewellyn* (a), *Napier v. Napier* (b), *Roe v. Reade* (c), *Wallop v. Lord Portsmouth* (d), *Jones v. Curry* (e), and *Denn v. Roake* (f). It was formerly held, that the will, to operate as an execution of the power, must either *refer to the power* in express terms, or specifically *describe the estate* subject to the power; but that doctrine has long been exploded; and the question now, as in all other cases respecting the construction of wills, is, what is the *intention* of the testator. The Court must give effect to all the clauses in the will; and unless they in effect strike out the latter part of the will, it must be held that the power is well executed.

E. J. Lloyd, contra. The will was not a due execution of the power. The circumstances under which the settlement was executed, cannot be taken into consideration. The question is, not what was intended by the testator, but whether the words which he has used are such as are inconsistent with any other intention than that of executing the power. This is laid down in *Denn v. Roake*, upon appeal

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(a) 1 Turn. & Russ. 104.

(b) 1 Sim. 28.

(c) 8 T. R. 118.

(d) Sugd. on Powers, 288.

(e) 1 Swanst. 66.

(f) 2 Bingham 497, 10 B. Moore, 113; 8 C. in error; 5 Barn. & Cresw. 720; 8 Dowl. & R. 514.

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in the House of Lords (a), and also when the case was before the Court of Common Pleas. In *Andrews v. Emmot* (b) it was said, by Lord Thurlow, that to execute a power by will, "it must be impossible to impute to a testator any other intention than that of executing it, and that the doctrine is not carried by any case further than this." It is therefore clear, that if it be possible to impute to the testator any other intention, *general* words, not referring to a power, will not be an execution of the power. It is also clearly established, that *general* words will not be an execution of the power, if the testator had any real property upon which these words can operate, besides that subject to the power. Looking at this will, it cannot be said that the testator had any other intention than that of devising *all his real estate*; nor can any *specific* intention (which is necessary in order to a valid execution of a power) be attributed to the testator in the use of the general words in the second clause, as distinguished from the first. It is mere conjecture to say, that the words in the first and in the second clause apply to different descriptions of property. Assuming that the testator intended one of these clauses to operate as an execution of the power, can it be said which of them was intended to have that effect? It is manifest the testator intended his will to be a devise of *all the real property* of which he was the owner. There being no reference to the power,—no specific reference to the property subject to the power,—both clauses of the will using general words,—and the testator having other property besides that subject to the power,—the will did *not* operate as an execution of the power. If further authority be wanting, this case was in effect decided by *Hougham v. Sandys* (c).

*Kindersley* in reply. It is admitted that the second clause would operate as a valid execution of the power, if the testator had been possessed *only* of the property subject to the power. After the first clause has been read, the Court,

(a) 6 Bingh. 475. (b) 2 Brown, C. C. 297. (c) 2 Sim. 95.

in construing the will, must consider the testator as being possessed of no property except that subject to the power, and then under the second clause this property subject to the power passed. If the testator had by *deed* disposed of all his property, except that subject to the power, and the will had contained the latter clause only, surely it would then have been a good execution of the power. If the testator had by *will* disposed of *all* his real estate, and by a codicil had disposed of all *other* his real estate, the codicil would have operated as an execution of the power, as there would have been nothing but the estate subject to the power for the codicil to operate upon. The second clause here must operate in the same way as it would in either of the cases supposed. *Hougham v. Sandys*(a) is distinguishable; as in that case, there were not, as here, *two* clauses in the will, *each* sufficient to pass all the testator's real estate and to operate as an execution of the power. Besides, the real estate had been converted into money at the time when the will was made, and although the doctrine in equity is, that money directed to be laid out in land must be considered *as land*, yet that is only where the question is between the heir and the executor.

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On the 9th of June, 1834, the following certificate was returned:—"We have heard this case argued before us by counsel, and are of opinion that the will of *Michael Williams* did *not* operate as an execution of the power contained in the indenture of release.

DENMAN,  
 J. LITTLEDALE,  
 W. E. TAUNTON,  
 J. WILLIAMS."

(a) 2 Simons's Reports, 95.



The KING v. MARSHALL FOWLER and others.

IN THE  
13 Geo. 3. c. 78.  
The Highway Act,  
a regulation  
may charge in  
his account,  
are expenses  
incurred in  
the discharge  
of his duty,  
though not in-  
curred on the  
particular spe-  
cial session  
of the act.

Law ex-  
penses incur-  
red in resisting  
a writ for a  
certiorari to  
remove the  
accounts, by  
a justice, of  
the accounts  
of preceding  
way-wardens,  
are expenses  
which a  
way-warden  
may insert in  
his account,  
and which the  
justices may  
allow, if they  
think proper.

All expenses  
bona fide in-  
curred by a  
way-warden,  
in the execu-  
tion of the  
duties imposed  
upon him by  
the Highway  
Act, may be  
inserted in his  
account, and  
may be allow-  
ed or disal-  
lowed by the  
justices, in  
their discre-  
tion.

IN Easter term last, *Wightman* obtained a rule, calling upon *Marshall Fowler*, Esq. and *T. M.*, Esq., two justices of the peace for the North Riding of Yorkshire, and *J. G.* and *J. A.*, way-wardens, or surveyors of the highways, of the township of Kirklevington, in the said Riding, to shew cause why a writ of certiorari should not issue to remove into this Court, an order made by the said justices, on the 7th November, 1833, allowing the accounts of the said *J. G.* and *J. A.*, as such surveyors, for the year ending on the 15th of October then preceding,—and also to remove the said accounts so allowed,—and also the bills of Messrs. *Garbutt & Co.*, referred to in the said accounts.

The 48th section of the Highway Act (13 Geo. 3, c. 78,) requires the surveyor of the highways for every parish, town-ship, &c., to collect the highway assessments,—and keep one or more books, in which he shall enter an account of all such money as shall have come to his hands by virtue, and for the purposes, of this act, and to whom and on what occasion he shall have applied the same,—and to produce such books &c. unto the inhabitants of the parish &c. at a vestry, or other public, meeting to be held for that purpose, within fifteen days before the special sessions appointed by the act to be held next after Michaelmas quarter sessions,—and that every surveyor, after the said books &c. have been produced, shall take the same to a justice of the peace of the county &c., and verify such account, upon oath, if required; and provides that such justice may allow such account, if he finds it just, or postpone it until such special sessions, if he finds cause for so doing, in which case it may be settled and allowed at such special sessions, after the parts objected to by such justice shall have been explained and verified by proper evidence, to the satisfaction of the justices at such special sessions,—and that in case any articles contained in such accounts shall not be explained or proved

to the satisfaction of such justices, they may disallow the same.

By the 65th section it is provided, that if the inhabitants of any parish &c. shall agree to prosecute any person by indictment, for not repairing any highway within such parish &c., or for committing any nuisance upon any highways, or to defend any indictment or presentment preferred against any such parish &c., it shall be lawful for the surveyor of such parish &c. to charge in his account the reasonable expenses incurred in carrying on or defending such respective prosecutions, after the same shall have been agreed to by such inhabitants at &c., or allowed by a justice of the peace, within the limit where such highway shall be.

By the 30th section, an assessment is authorized to be made for expenses for buying materials, making satisfaction for damages, erecting guide posts, and making tunnels, and for the salary of the surveyor.

By the 80th section, an appeal is given to the quarter sessions; and it is provided, "that no proceedings to be *had or taken in pursuance of this act*, shall be quashed or vacated for want of form, or removed by certiorari or any other writ or process, (except as therein mentioned,) into any of His Majesty's courts of record at Westminster."

15th October, 1833. At a meeting of the inhabitants of the township of Kirkleavington, one of the surveyors of the highways produced his book of accounts, in which were items for business done by Messrs. *Garbutt and Son*, as attorneys. One of these was a charge of 87*l.* 8*s.* 2*d.* for resisting a rule nisi for a certiorari to remove an order made by *Benjamin Flounders, Esq.*, allowing the accounts of the surveyors of the township in 1832 (a). Another was an item of 9*l.* 1*s.*, the balance of Messrs. *Garbutt & Co.*'s bill for business done at the Christmas sessions, but it did not appear what was the subject of the business. These two items were objected to, and the majority of the inhabitants present at the meeting refused to approve of the accounts.

(a) See *Ret v. Flounders, ante*, 592.

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On the 31st of October, another meeting was held, at which the accounts were again presented, when it was determined by a majority, that the bills of Messrs. Garbutt & Co. ought to be withdrawn from the account, and it was determined to represent to the magistrates that the account ought not to be allowed by them. The accounts, including the obnoxious items, were subsequently signed by three of the inhabitants of the township, and were on the 5th Nov 1833, presented to Mr. *Meynell*, a magistrate, for his allowance. Mr. *Meynell* postponed the examination of the accounts until the special sessions, to be holden on the 7th of November, 1833. On that day Mr. *Bates*, an inhabitant of the township, attended the magistrates with a representation from the majority of the second meeting. The magistrates, *Marshall Fowler*, Esq. and *T. M.* Esq., after hearing the parties, signed and allowed the accounts.

*Alexander* now shewed cause. This is an attempt to question the propriety of the magistrates' decision, in a case in which that decision is final and conclusive. This Court has no jurisdiction over the matter. It is manifest, from the affidavits on both sides, that every thing required by the 48th section of the Highway Act, in order to give the magistrates jurisdiction, has been duly observed. There was a meeting of the inhabitants of the township, at which the surveyors produced their accounts;—those accounts were examined and allowed by three of the inhabitants;—they were subsequently taken to one justice, who adjourned the hearing until the special sessions, when they were allowed, and the business concluded. Whatever proceedings therefore have taken place, they have been "had or taken in pursuance of the act." Now the 80th section has taken away the certiorari in such a case, and this Court therefore cannot entertain the application. For this *Rex v. The Justices of St. Alban's* (a) is a direct authority. There the question was, whether an appointment of surveyors of

(a) 5 Dowl. & Ryl. 538; 3 Barn. & Cressw. 698.

highways, under the 13 Geo. 3, c. 78, could be removed by certiorari, and the Court held that it could not. It was chiefly argued on the ground that where no appeal is given, the certiorari is not taken away, and that no appeal lies against such an appointment. But *Abbott*, C. J., after expressing his opinion that an appeal does lie against an appointment of surveyors, expressly disclaims the supposed distinction between cases where appeal does or does not lie. "Independently," his lordship observes, "of all question about the appeal, I think that the certiorari is taken away by the general words of the 80th section." But even assuming it to be doubtful whether all the formalities prescribed by the 48th section had been strictly observed, *Rex v. Casson and others* (a) is an authority to shew that the certiorari is not the less taken away. In addition to which it may be observed, that Mr. *Bates* attended the special sessions on behalf of the town's meeting, and did not object to the jurisdiction of the magistrates. By that conduct he has precluded himself and them from now disputing it. Several cases may be cited in which a certiorari has been granted to remove proceedings under the Highway Act, and which therefore may at first view seem to militate against the argument now offered to the Court; but they are all distinguishable. *Rex v. The Justices of the West Riding of Yorkshire* (b), decided only that no appeal lies to the quarter sessions, against the allowance of the accounts of the surveyor of the highways. There the Court of Quarter Sessions had entertained such an appeal; and as they had no jurisdiction, the proceedings complained of were clearly not "had or taken in pursuance of the act." The 80th section therefore was inapplicable, and the Court granted a certiorari. *Rex v. Mitchell* (c) is also distinguishable from the present case, on the same ground. In *Rex v. The Justices of Somersetshire* (d), the accounts were not

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(a) 3 Dowl. &amp; Ryl. 36.

(d) 5 Barn. &amp; Cressw. 816; 8

(b) 5 T. R. 629.

Dowl. &amp; Ryl. 733.

(c) Ibid. 701.

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laid before one justice, but were certified in the first instance to the special session, a proceeding in direct contravention of the 46th section, and therefore not "had or taken in pursuance of the act." The same circumstances, though in an anonymous case in 5 *Bar. & Cressw.* 151. n., and in *The Justices of Derbyshire (a)*. In *Rex v. The Justices of the North Riding of Yorkshire (b)*, the surveyors exhibited their accounts before one magistrate, but they requested to take the assessments with them, for which reason the magistrate did not proceed to investigate the account but referred the whole of them to the justices at quarter sessions, by whom they were allowed. This allowance was held to be invalid, on the ground that the accounts ought to have been exhibited before the single justice, in such manner as to enable him to exercise his judgment upon them, which it was obvious he could not do unless furnished with the assessments. The proceeding, therefore, was not "had or taken in pursuance of the act," and a certiorari properly issued. (Here he was stopped by the Court.)

*Wightman* and *Stephen Temple* in support of the rule. The justices had no jurisdiction to allow these items: they were costs personal to the surveyor. *Rex v. The Justices of Somersetshire* decides, that if every preliminary requisite of the act have not been complied with, the justices have no jurisdiction; and where that is the case the Court will grant a certiorari. The statute does not give the justices authority in general terms to examine and allow the accounts of the surveyors. It points out in section 30 the purposes for which the rate is to be made and applied. By the 65th section, certain law expenses, other than such as are here charged for, are, by express enactment, permitted to be inserted in the accounts upon certain conditions precedent. It is true there is no prohibition in express terms of the insertion of other law expenses, but the maxim *expressio unius exclusio est alterius* applies. Why should the statute specify particular law expenses,

(a) 2 Lord Kenyon, 299.

(b) 5 *Bar. & Cressw.* 152.

and enact that such may be inserted in the account, if it intended to permit other law expenses of any description to be also inserted? In the first place, the law expenses in this case are of a totally different nature from those described and allowed by the statute. Secondly, the preliminary requisites of the 65th section have not been complied with; for the surveyors, instead of having the *consent* of the inhabitants to incur them, had a direct order from them to the *contrary*. The surveyors, therefore, had no power to *insert* them in the accounts, and the justices could not have the power to *allow*, what the surveyors had no power to *charge*. *Rex v. Bird (a)*. [*Taunton, J.* That case was upon a different statute. *Williams, J.* Suppose the magistrates had jurisdiction over 19 out of 20 items, would not the certiorari be taken away?] It is contended that it would not. *Rex v. Saunders (b)*. [*Lord Denman, C.J.* It appears to us very doubtful whether or not *any* law expenses can be introduced into the account, except under the 65th section.]

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The Court then called on *Alexander* to argue that point.

*Alexander*. It must be conceded that, *in terms*, the 65th section does not embrace the costs now disputed. But, independently of that section, the magistrates have a right to judge of the propriety of the costs which the surveyor may have incurred in matters *necessarily* connected with his official duties. A variety of cases may be suggested in which the surveyor, in the strict performance of the duties imposed upon him by the act, will necessarily and unavoidably incur law expenses not expressly specified in the 65th section. Several cases may be readily supposed in which the surveyor might be subject to hostile proceedings, either by mandamus or action, where he had nevertheless faithfully discharged his duties without in any instance exceeding his powers. The construction of the statute which the applicants desire would lead to a con-

(a) 2 Barn. & Alders. 522.

(b) 5 Dowl. & Ryl. 611.



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sequence so harsh and unjust, as to throw upon a public functionary an ultimate *personal* liability for costs which he had *officially* incurred, and which he had no means of preventing. The costs in question may fairly be considered as "disbursements" within the meaning of the 48th section, and as such are examinable by the magistrates, and, if examinable, are allowable.

LORD DENMAN, C. J.—It appears to me that the sole question in this case is, whether the magistrates have *jurisdiction*. I had some doubt of it for some time, but on consideration I am of opinion that they have jurisdiction. All expenses *bonâ fide* incurred by the surveyors in the execution of the duty imposed upon them by the statute, are matters on which the justices may exercise their discretion.

LITLEDALE, J.—By the 48th section the surveyor is to keep a book in which he is to enter an account of all such money as shall have come to his hands by virtue and for the purposes of the act, and *to whom* and *on what occasion* he shall have paid or applied the same. He is therefore to keep an account of his *disbursements* and *expenditure*. These law expenses are a part of the disbursements and expenditure of the surveyor, and therefore I think the magistrates had jurisdiction; and that being the case, the certiorari is taken away. But it is said that, as *certain* law expenses are specified in the 65th section to be allowed to the surveyor in certain cases, no other law expenses are to be allowed. The surveyor may, however, in the performance of his duty, incur very serious expenses besides those, and it would be very hard upon him if he were not allowed to charge them in his account.

TAUNTON, J.—By the 48th section, the surveyor of the highways is to keep a book in which he is to enter an account of all such money as shall have come to his hands, and to whom and on what occasion he has paid or applied

the same. The statute then goes on to say, that the book shall be produced at a vestry or other public meeting of the inhabitants, and that, after the book shall have been so produced, he shall take it to a justice of the peace, and verify it upon oath, if required. That is, the justice may administer an oath to the surveyor that the items are correct in point of fact. The statute then goes on to say, "and such justice may allow such account if he finds it just, or postpone it until such special sessions, if he find cause for so doing, in which case it may be settled and allowed at such special sessions." Therefore, there is first given a power to a single justice to allow the account, if he thinks it just, or to postpone it to the special sessions,—at his discretion. If he does postpone it, there is also power to the justices at the special sessions to allow the account. We are now on a question of *jurisdiction*. Surely the magistrates had jurisdiction to allow this account, if they thought it just. It by no means follows that, because the magistrates have allowed what they ought to have disallowed, therefore they acted without jurisdiction. It struck me very forcibly at one time, that the 65th section confined the law expenses to be allowed to the surveyor to such as were mentioned in that section; but upon further consideration, I think that this would be much too narrow a construction of the act.

WILLIAMS, J.—I am of the same opinion. It seemed to me that the counsel in support of the rule were driven to contend that, although the bulk of the bill was matter over which the magistrates had jurisdiction, yet, if there was one item over which the magistrates had not jurisdiction, the certiorari was not taken away; and in answer to my question, Mr. *Temple* cited a case in which it was held, that where counts on the 30th *Geo. 2*, c. 24, sec. 20, which prohibits the obtaining of money by false pretences and takes away the certiorari from the court of quarter sessions, were joined with counts on a conspiracy at common law to obtain money on false pretences, the certiorari

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was not taken away. Now, assuming that that case is applicable, there still remains the question whether these items were within the jurisdiction of the magistrates. I confess I have very considerable doubts on this subject; but, however, on the whole, I incline to think that the justices had jurisdiction. I am not inclined to let loose the power of issuing a certiorari.

Rule discharged without costs.

CAMPBELL v. FLEEMING and JONES.

If a vendee, after discovering the sale to be fraudulent, deals with the property as his own, he cannot recover the purchase money, upon subsequently detecting further circumstances of fraud in the sale.

**ASSUMPSIT** for money had and received. Judgment against *Jones* by nil dicit. *Fleeming* pleaded the general issue. At the trial at Guildhall, before Lord Denman, C. J., at the sittings after last Hilary term, it appeared as follows:

In 1824, Colonel *Campbell*, the plaintiff, induced by a prospectus shewn to him by *Stewart*, the agent of *Jones*, purchased 100 shares in the St. Agnes Mining Association, at 50*l.* a share. The prospectus contained a statement that 50,000*l.* had been raised. It enumerated the mines purchased; set forth the power of the engines, the discovery of new lodes of ore, and the raising and stamping of large quantities of tin; and stated that if the purchaser preferred a certain interest to the chance of the produce of the mines, he might be insured 8 per cent. Colonel *Campbell* was assured also, previously to the purchase, that the shares belonged to Mr. Alderman *B.* of N., whose daughter was about to be married, and that he wished to sell the shares, as he wanted the money for the marriage portion. This was a gross deception practised by *Jones*, and to which, as it was alleged, *Fleeming* was also a party. The statement contained in the prospectus was almost entirely false. The shares sold to Colonel *Campbell* belonged to *Jones*, and not to Alderman *B.*, and *Jones* and *Fleeming* were the only proprietors of the St. Agnes Mining Association.

In 1823, Colonel *Campbell*, after discovering the falsehood of these representations, entered into an arrangement with *Jones* that *Jones* should assign to him certain other shares in the St. Agnes Mining Association, receiving 1500*l*.

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In 1824 another company was formed, called the Tywarnhaile Mining Association, of which Colonel *Campbell* was a director; and this company purchased the whole of the shares and effects of the St. Agnes Mining Association, paying *Jones*, in consequence of that arrangement, 5000*l*. for his interest.

It appeared, however, that at the period when Colonel *Campbell* purchased the shares in the St. Agnes Mining Association, it was represented to him that that Company had expended 50,000*l*., when in fact they had expended only about 5000*l*.; and that Colonel *Campbell* was not aware of *this particular misrepresentation* until after the arrangement with *Jones*, and the formation of the Tywarnhaile Mining Association. It was contended by Sir *James Scarlett*, who was counsel for the defendant, that the plaintiff ought to be nonsuited, since, by making the arrangement with *Jones*, and entering into the Tywarnhaile Mining Association, and as a shareholder of that company purchasing the shares of the St. Agnes Mining Association, after he was aware of the deception that had been practised, he adopted the original contract, and could not therefore now treat it as void.

The Chief Justice was of opinion that this objection to the plaintiff's right to recover was fatal, and directed him to be nonsuited.

*F. Pollock* now moved for a rule nisi to set aside the nonsuit, and for a new trial. The point on which the nonsuit proceeded was a question for the jury. The conduct of the defendants was proved to be fraudulent, and the result of the evidence for the defendants was, that the plaintiff had dealt with the shares after he had discovered that the transaction was a bubble. It should have been left to the jury to say, whether the conduct of Colonel *Campbell* was such

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as to prevent his maintaining this action. The plaintiff was at liberty to repudiate the contract for the shares if it was a fraud. [*Parke, J.* He actually adopts it by the agreement in 1824.] A party cannot adopt a fraud. It is matter out of which no contract can arise. No conduct of the plaintiff's could be construed into an adoption of the contract, unless he had *full* knowledge of *all* the circumstances of the case; and this, it appears, was not the case here, as the plaintiff, when dealing with the property, was ignorant of one act of fraud. This is different from a case of mere misrepresentation. The parties here might have been indicted for a conspiracy. If the basis of the whole transaction was a criminal act, no contract could arise out of it, and no act of the plaintiff under it could transform it into a valid contract.

LITLEDALE, J.—I think the nonsuit is right. There was, no doubt, a gross fraud practised on the plaintiff in the first instance. He might *then* have brought his action. But after he became acquainted with the fraud he deals with the shares as shares purchased by him. He cannot after this repudiate the contract for the purchase of those shares, although he was not at that time *so fully* acquainted as he was afterwards, of the fraud practised upon him.

PARKE, J.—I am entirely of the same opinion. The case was on a former occasion sent for a new trial, on the ground that the plaintiff had subsequently adopted the contract. The principle of law is clear. If there is a contract made between two parties, and one of them is guilty of fraud in respect of the contract, the other has the election of repudiating the contract. Fraud gives the party upon whom it is practised the right of election. It does not do more. In this case it is clear to me that the plaintiff knew of the fraud, and that he was acquainted with every thing relating to the St. Agnes Mining Association.

PATTESON, J.—No contract can arise out of a fraud, and a suit to enforce a fraudulent contract cannot be sus-

tained. If an action had been brought by the defendants against Colonel *Campbell* for the price of the shares sold to him, it would not have been maintainable. In this case the plaintiff seeks to recover the price of certain shares, on the ground that the contract for the shares was fraudulent, and therefore void. To entitle the plaintiff to sustain this action, it should have been brought as soon as he discovered the fraud practised upon him; but instead of doing so, he deals with the very thing which he now says he never had any right to. Long afterwards the plaintiff discovers some other circumstances of fraud, and for that reason concludes he has a right to have the price of the original shares returned to him. These circumstances which the plaintiff has since discovered are a part of the *original* fraud, which he has by his acts adopted, and therefore can give him no right to recover.

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Lord DENMAN, C. J.—I acted on the principle which has been stated so clearly by the rest of the Court.

Rule refused.

DOE, on the demise of BENJAMIN HORNBY, v. GLENN.

**EJECTMENT** for a messuage near the city of York, tried before *Taunton, J.*, at the York spring assizes, 1834.

The defendant, by indenture, demised to *Preston Hornby* the messuage in question for fourteen years, from 6th April, 1829, at 34*l.*, payable half-yearly.

15th November, 1833, *P. Hornby* died, in embarrassed circumstances. The defendant went upon the premises to obtain payment of October rent. He found the widow of *P. Hornby* and the lessor of the plaintiff upon the premises; and it was agreed between them that the defendant should forego the half-year's rent, and have immediate possession. Under this arrangement the widow gave up the possession

An executor de son tort, to whom administration is subsequently granted, may repudiate an agreement made by him to surrender a term for years vested in the intestate.

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to the defendant. The lessor of the plaintiff subsequently took out letters of administration to *P. Hornby*, tendered the rent, and brought this action. The lease contained a proviso that if the rent was unpaid for twenty-eight days, the demise should be void (*a*). As the half-year's rent was due on 11th October, the twenty-eight days expired on the 9th November.

A verdict was, under the direction of the learned judge, given for the plaintiff, his lordship being of opinion that the defendant had not entitled himself to the possession under the clause of re-entry, inasmuch as the formalities of the common law with respect to the demand of rent had not been complied with,—and that the agreement with respect to the possession could not avail the defendant, because in the first place there was no surrender in writing (*b*), and because, secondly, the lessor of the plaintiff had not, at that time, taken out letters of administration. His lordship, however, gave the defendant leave to move to set the verdict aside and enter a verdict for himself.

F. Pollock (in Easter term) moved accordingly. There was an acquiescence in the forfeiture by the lessor of the plaintiff, and a valid agreement by him to give up the possession of the premises. [*Parke, J.* At that time there was no one who had any authority to acquiesce.] The lessor of the plaintiff cannot dispute the validity of the agreement. In *Curtis v. Vernon* (*c*) Lord *Kenyon* held, that an executor de son tort cannot, after he has taken out letters of administration, treat his previous acts as wrongful, and that by taking out letters of administration, he renders valid his previous acts. Lord *Kenyon* says, "The case in *Strange* (*d*) shews this matter very clearly; where the Court

(a) *Vide Smith v. Spooner*, 3 Taunt. 246. v. *Ridout*, *ibid.* 519.

(b) See *Thomas v. Cook*, 2 Barn. & Alders. 119; *Whitehead v. Clif-* (c) 3 T. R. 587, 590; S. C. in error, 2 H. Bla. 18.

(d) *Vaughan v. Browne*, 2 Stra. 511. *ford*, 5 Taunt. 518; *Doe d. Read* 1106.

said, it would be extremely hard that if a person entitled to administration is opposed in the Ecclesiastical Court, and does any act pendente lite to make himself executor de son tort, those acts should not be purged by his afterwards obtaining letters of administration; and they added, that the *granting of administration legalises those acts which were tortious at the time.*" If the acts of the executor de son tort are legal, all other acts in which he has induced other persons to concur with him ought also to be legal. [*Parke, J.* There are two cases on the subject; the one decided by Lord *Holt* (a), and the other determined about five or six years ago (b). All acts done by him before he is rightful administrator, are void when he obtains a new title by letters of administration.] The defendant entered upon the premises to demand the rent. He ought not to be prejudiced by this arrangement. [*Parke, J.* If he had demanded the rent on the twenty-eighth day, at the principal door of the dwelling-house, his title would have been good.] (c)

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By the COURT (d)—

Rule refused.

(a) *Parker v. Kett*, 1 *Ld. Raym.*
 661.

(b) *Mouniford v. Gibson*, 4 *East*,
 441.

(c) *Vide* *Co. Litt.* 201 *b*, 202 *a*;
 2 *Tho. Co. Litt.* 91, 93.

(d) *Lord Denman, C. J., Little-*
dale, J., Parke, J., and Patteson, J.

WARDROPER *v.* RICHARDSON.

PLATT, in Easter term last, moved for a rule nisi calling upon the plaintiff's attorney or agent to produce the record and postea before the Mayor of Colchester, before whom this cause had been tried by writ of trial, that he might certify thereon to deprive the plaintiff of his costs, less than forty shillings damages having been recovered. By 43 *Eliz.* c. 6 (e), it is enacted, "that if upon any action personal to be

The judge of an inferior court, to whom a cause is sent by writ of trial, cannot certify to deprive the plaintiff of costs where less than 40s. is recovered.

(e) Sect. 2.

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brought in any of Her majesty's Courts at Westminster, nor being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery,—it shall appear to the judges for the same court, and is signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of forty shillings or above, that in every such case (a) the judges and justices, before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less, at their discretions." The case was sent by this Court for trial pursuant to 3 & 4 Will. 4, c. 42, s. 17. It is therefore "an action brought in one of the Courts at Westminster." [*Littledale*, J. The words "judges and justices" must mean the judges and justices of the Courts at Westminster. *Parke*, J. It was not intended, by the act of 3 & 4 Will. 4, to give this power to persons to whom causes are sent by writ of trial. There was once a clause in the *bill* to enable them to certify, but it was struck out.] *Foxall v. Banks* (b) shews that it is not too late to make this application; and the Court must hold that the statute of *Elizabeth* applies to this case,—otherwise the operation of that statute must be limited to causes tried before a judge of the court out of which the record proceeded.

LORD DENMAN, C. J.—We think the statute of *Elizabeth* does not reach this case.

The other judges concurred.

Rule refused.

(a) Although the plaintiff could not have sued elsewhere; *Wright v. Nuttall*, 10 Barn. & Cressw. 492.
 (b) 5 Barn. & Alders. 536.

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DEBT for tolls for the passing of carts laden with beer, on 31st May and 23d June, 1830, and of sheep on 23d June, 1830. Plea: nil debet.

At the trial before *Alderson, J.*, at the York spring assizes, 1832, a verdict was found for the plaintiffs in respect of the tolls claimed for the passage of the *carts*, and for the defendant in respect of the tolls for the passage of the *sheep*,—subject to a special case, stating in effect as follows:

The plaintiffs, as lessees under the Duchy of Lancaster, are entitled to tolls at Boroughbridge, payable as *toll-traverse*. They proved (as in *Lord Pelham v. Pickersgill (a)*), that the tolls had belonged by prescription to the manor of Bure (of which the borough of Boroughbridge was parcel),—and that the manor had belonged to the crown at the time of the Conquest, and had continued to belong to the crown and the duchy of Lancaster respectively, down to the reign of *Charles I.*, who aliened the manor, reserving the tolls.

The defendant did not deny the *general right* of the plaintiffs, but he claimed a special *exemption* in himself from the liability to pay these tolls; in support of which claim he gave in evidence several charters; and first,

33 *Edw. 1.*, inspeximus and confirmation of a charter of *Hen. 3.*, inspecting and confirming a charter of *Hen. 1.*

The charter of *Hen. 1.* commenced by a clause by which the king granted and confirmed (*b*) the possessions, and dignities, and customs of the liberty (*c*) which the Church

(a) 1 T. R. 660.

confirmo."

(b) By the words "concedo et

(c) "Libertatis consuetudines."

sheep, part of his farming stock on his copyhold, going to a fair to be sold.

Whether, if one of the *ecclesiastical body* had claimed to be free from toll in respect of *merchandise*, the charter would have been held to give to him such an immunity, *quære*.

* The defendant had a chattel interest in the manor, and was stated to be seised of a copyhold within the manor, though in what manner that copyhold was protected from merger (as the legal effect of the uniting of the two estates) does not appear.

By ancient charters, the king, being seised of toll-traverse, granted to a dean and chapter, for themselves, and their freeholders and other men, that they should be quit of toll:—Held, that a copyholder* who makes beer for sale, upon premises holden by him of the Dean and Chapter, and within the liberty of the Church, throughout which the Dean and Chapter possess jurisdiction by virtue of the charters granted to them, is exempt from the payment of tolls in respect of a cart laden with such beer.

A fortiori is he exempt from payment of tolls in respect of

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of York had, in the manner thereunder written. Below there was a clause which granted to the Canons, in their houses and in their lands (inter alia), *freedom from toll* (a), and all the same customs of honor and liberty which the king himself had in his lands, and which the Archbishop held from the king.

The charter of *Hen. 3* contains a grant to the Church of York, "that the Dean and Chapter, and all the Canons and their successors, and all their men (*eorum homines universi*) should be quit of toll and of other matters (*theolonio, tallagio, passagio, pedagio, lastagio, stallagio, hydagio, wardagio, &c.*), in city and borough, in fairs and markets, in the passage of bridges and ports of the sea, and in all places throughout the whole of England, Ireland and Wales, and all the king's lands and waters (b).

The defendant next proved certain proceedings in quo warranto before the justices in eyre in 3 *Edw. 3*, by which the Dean and Chapter of the Church of St. Peter, York, were summoned to answer by what authority they claimed various liberties particularly specified therein. The Dean and Chapter, in their plea, set out various clauses from the charter of *Hen. 3*, and confirmations thereof, and further set out a clause in a charter of *Edw. 2*, which they bring into court. In that clause the king recites that it had been asserted and pretended that the liberties and immunities (*quietanciæ*) of the Church of York did not extend to the freeholders (c) (*liberè tenentibus*) of the Dean and Chapter, but was confined to their villeins; and he therefore, to

(a) See Cowell Interp. *Toll*.

(b) In civitate et burgo, in foris et nundinis, in transitu pontium et maris portuum, et in omnibus &c.

(c) As no man could be a freeholder (*liberè tenens*) who was not a freeman (*liber homo*), all freeholders were necessarily freemen standing in the relation of tenants, or *free tenants*; but as a freeman might, even at a very early period,

hold for years, or even at will, without having a freehold in the property so held, it was not true, e converso, that all *free tenants* (i. e. freemen-tenants, *liberi tenentes*) were also *freeholders* (*liberè tenentes*). But at the time when an occupier for years or at will was not regarded as a *tenant*, the distinction would not exist; nor since that period has it always been attended to.

remove the ambiguity and to provide for the security in that behalf of the Dean and Chapter, and their men and freeholders, conceded and declared that the aforesaid liberties and immunities should be understood as well for their freeholders as for their other men (*cæteris hominibus suis*), and that the Dean and Chapter should for ever use and enjoy all the aforesaid liberties and immunities, as well for their freeholders as for the rest of their men. This record, after reciting a confirmation by *Edw. 3* of the aforesaid liberties, concludes with the king's writ for their allowance (*a*).

The defendant further shewed that the above charters were further confirmed by two charters of 3 and 7 *Ric. 2*; and it is admitted for the purpose of this cause that the right to the tolls was in the crown, *jure coronæ*, until after the date of this last charter.

The several charters above mentioned were accepted by the Dean and Chapter, who have constantly exercised the jurisdiction (*b*) granted to them by those charters within the liberty of St. Peter of York, and they have been accustomed for many years back to grant to the tenants of the liberty what are called charters of exemption, one of which the defendant had at the time when the tolls were demanded of him. It recited that by custom and by charters, and by acts of parliament, the Dean and Chapter of St. Peter's, York, and the men and tenants, and all other the inhabitants within the liberty of the Dean and Chapter, had and enjoyed several remarkable privileges and immunities, and were acquitted of and from payment of all and all manner of tolls, tonnage, pontage, murage, pedage, lastage, and stallage whatsoever, in all fairs and markets within the realm of England, Ireland, and Wales. It then certified that *William Lambert* (the defendant) of Helparby, common brewer, was an inhabitant within the liberty of the said

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(*a*) See the form, Mann. Exch. Pract., Revenue Branch, 348.

(*b*) The special case set out

parts of the charter granting jurisdiction, but not bearing upon the question of immunity from toll.

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Dean and Chapter, and was to have and enjoy the benefit of all franchises and privileges within the said charters contained to the men and tenants of the said liberty appertaining, and was to be toll-free in all places in England, &c. The defendant has resided for many years at Helparby, in the county of York, in which place the Dean and Chapter had various possessions at the time when Domesday Book was compiled; as appeared by that document.

Helparby is a manor within the liberty of St. Peter, and parcel of the possessions of the Dean and Chapter. The inhabitants of Helparby attend at the quarter sessions held for the liberty of St. Peter, to serve on juries there. The constable attends there. The surveyors of highways for Helparby are appointed, and public-houses licensed, there. All the land in Helparby is copyhold of the manor (a). The defendant is lessee, for twenty-one years, of the manor, under the Dean and Chapter. He has resided for several years in his own house, which is built on copyhold land, parcel of the manor, and he occupies 140 acres of land, his own estate, both arable and pasture, within, and copyhold of inheritance of, the said manor. He has also carried on very considerable business, as a brewer, on the premises so occupied by him; and during such his occupation two of his carts laden with *ale, brewed by him as a common brewer for sale*, and half a score of *sheep, being a part of his farming stock*, passed over the bridge at Boroughbridge. Toll was demanded as usual, but the defendant refused to pay it. The sheep were in charge of the defendant's servant, going to the fair at Boroughbridge. The cart and horses were also driven by the defendant's servant; and by his orders one of the carts passed over the bridge on a day which was *neither a fair nor a market day*.

The question for the Court is, whether the plaintiffs are entitled to toll in respect of the passage of the two carts laden with ale, or of either of them, or of the sheep.

(a) There is of course freehold copy, as otherwise the manor would be extinct. 5 Mann. & Ry. 144(b).

This case was fully argued in last Trinity term, by *Starkie* for the plaintiffs, and *Coltman* for the defendant, before *Denman*, C. J., *Taunton*, J., and *Patteson*, J.

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The Court took time to consider, and in Easter term

Lord DENMAN, C. J., delivered the judgment of the Court. (After stating the most material facts of the case, his lordship proceeded as follows:)

Looking at the mere words of these documents, without more, the defendant's claim to exemption would seem to be distinctly made out. King *Henry 3*, (in whom at the time the right to this toll was, and who was therefore competent to discharge it,) grants an exemption from this and all other toll to *all the men* of the Dean and Chapter, of whom the defendant is one. Difficulties, however, and very great ones, occur in the consideration of this subject. We are called on to put a legal construction upon charters of great antiquity, upon a question which, in modern times, does not appear to have been discussed, and upon which the authorities (most of them of very remote date) are not consistent. For the defendant it has been contended, that a grant of exemption of this sort, made to ecclesiastical persons, could only enure to their benefit when the articles were conveyed for the necessary sustenance of their houses, or the cultivation of their land, and not for the purpose of carrying on trade or merchandize. It also has been endeavoured to be shewn, that these *men* of the Dean and Chapter must be privileged to the same limited extent, and in the same manner, as *tenants in ancient demesne*, of whom *Coke* declares (*a*) that they "shall pay no toll, because at the beginning, by their tenure, they applied themselves to the manurance and husbandry of the king's demesnes, and therefore for those lands so holden, and all that came and arose thereupon, they had the said privilege (*b*); but if such

(*a*) 2 Inst. 221.

3 Mann. & Ryl. 140, 230 n., 240,

(*b*) As to these tenants, *vide* 248, 250, 336.

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a tenant be a common merchant, for the buying and selling of wares and merchandizes that arise not upon the manurance or husbandry of those lands, he shall not have the privilege for them, because they are out of the reason of the privilege of ancient demesne, and the tenant in ancient demesne ought to be rather a husbandman than a merchant, and so the books are to be intended." And for this he gives the words of an ancient record (a), which is directly in point. To the same effect also are *Bro. Abr.* tit. Toll, pl. 1 (b); 9 *Hen.* 6, 25 (c); *Bac. Abr.* tit. Fairs and Markets, (D.) (d); *Vin. Abr.* tit. Toll, (E.) (e); and *Com. Dig.* tit. Toll, (G.). On the other hand, *Fitzherbert* (f) is of a contrary opinion, and says, that tenants in ancient demesne shall be quit of toll for their goods and chattels which they merchandize with others, as well as for their other goods, for the writ is general, pro bonis et rebus suis. For this doctrine he relies on the Year Book, 7 *Hen.* 4, 44 (g). But this book, it is clear, he misunderstood. To a declaration in that case, for selling beasts at a market and fair without paying toll, the defendant pleaded that he was a tenant in ancient demesne, and that all those have been free to buy and sell beasts for manuring their lands, &c. without toll, time out of mind, and that he bought at fairs, and some he used for manuring his land, and some he put to pasture to make them fat and more fit for sale, (pur eux faire grass & plus able a vendre,) and some time after sold them at a fair. The plaintiff offered to aver that he bought the beasts to sell them, and that he sold them ut suprâ. The defendant demurred, and the opinion of the Court being against him (the plaintiff,) he became nonsuit. Now here, there was no claim by the defendant to be quit of toll for all merchandize, but for beasts only bought and sold for the culti-

(a) H. 14 E. 1. coram rege, rot. 41, Devon.

(b) Citing 9 H. 6, fo. 25.

(c) By all the justices, T. 9 H. 6, fo. 25, pl. 20.

(d) 5th & 6th ed. vol. iii. 113.

(e) 20 Vin. Abr. 292.

(f) Natura Brevium, 228.

(g) *The Wednesday and Dudley Toll case*, P. 7 H. 4, fo. 44, pl. 11.

vation of his lands; and the opinion of the Court only was, that the circumstance of the defendant's selling the beast again, after he had fattened them on his land, was not to be deemed merchandizing; and this view Lord *Hale*, in his note to *Fitzherbert*, appears to have taken, for he adds, "So that it seems for things bought for their sustenance in manuring their lands or concerning husbandry, they are discharged, and not for merchandize, and the merchandize of them is different from other merchandize" (a).

But we are not called upon in this instance to decide, in this conflict of authorities, what the privileges of a tenant in ancient demesne may be, because the defendant does not claim in that character. The privileges of a tenant in ancient demesne rest on the custom of the realm,—the claim of the present defendant, on the king's express grant by charter; and if the words of the grant be plain, there is no occasion to resort to doubtful analogy for explanation. For the same reason it does not appear to us to be necessary to

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(a) This statement of 'The Wednesbury and Dudley Toll case,' appears to be taken not from the Year Book at large, but from one of the numerous inaccurate notes in the English editions of *F. N. B.* In the Book at large the replication runs thus: "*Nous vous diomus que estes common marchand, et uses pur acheter et vender beasts in fuyres et markets avantdits; et voillomus averrer que vous achatastes les boefs pur eux revender, et six boefs vendastes al foyre en le feast d'Ascension, come nous avomus counta.*" "We say that you are a common merchant, and are accustomed to buy and sell beasts in fairs and markets; and we aver that you bought the oxen to resell them, and that you sold six oxen in the fair at the feast of Ascension, as we have declared." To this replication the

defendant demurred, and obtained judgment, P. 7 H. 4, fo. 44 b.

Fitzherbert appears to have concluded that the circumstance of the defendant's being a common cattle dealer, who had bought these very beasts *for sale*, the truth of which was admitted by the demurrer, did not derogate from the privilege. And see Statham's Abridgment, *Toll*, pl. 3; *Fitz. Abr. Toll*, pl. 9; *Bro. Abr. Auncient Demesne*, pl. 14, *Custom*, pl. 13, *Toll*, pl. 3.

The translator, in the notes to *Fitzherbert*, appears to have been misled by mistaking the effect of the words "*come nous avomus counta.*" Referring these words to the whole replication, instead of the last clause of it, he assumed that the replication contained nothing which had not been previously stated in the declaration.

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decide what privileges ecclesiastical persons in general have with respect to toll, upon which judicial opinions have not been unanimous. See *Com. Dig.* tit. Ecclesiastical Persons, (D.) There are not wanting authorities that such a grant as the present extends only to buyings and selling of necessaries, and not of common merchandize; 2 *Roll Abr.* 202, 2 *Inst.* 221, *Rot. Parl.* 8 *Edw.* 2, n. 12, 1 to Panage (a). It should seem, however, from passages in some books, that the grant was considered to be general. *Vin. Abr.* Toll, (E.) 48; *F. N. B.* 227, 228; in which last book are given forms of writs in redress of lay corporations to which charters of exemption have been granted. These writs recite the privilege to be without qualification. Now though possibly if the claim here were made by one of the ecclesiastical body of the church of York, there might be good ground to contend that the exemption belongs only to them for their ecclesiastical goods, or for manuring their land, or for personal necessities, though we by no means say it would: yet here the claim is by a man of the Dean and Chapter, who not bearing the clerical character, does not seem to come within any of the reasons which apply to a restriction in the case of an ecclesiastic, to whose calling a trading in merchandize was repugnant, and therefore not to be encouraged by exemption from toll. This distinction would certainly be liable to the objection, that the subject matter of the grant, namely, the exemption, would differ according as the party claiming was a member of the body or a tenant,—would be larger in the case of the latter than in that of the immediate grantee. But as the words of the charter of *Hen. 5* are clear and unambiguous, and the exemption is without qualification, (there being no necessity for any in the case of a copyhold tenant,) we think that we cannot introduce any from the uncertain dicta of even the most distinguished

(a) "De hiis que providentur pro sustentacōe canonicorum et familie sue, panagium non solvatur. Set si ipsi vel famuli sui lucrando studio mercaturas exerceant, sol-

vant inde panagium prout decet." *Royal Answer to the Dean and Chapter of Lincoln*, *Rot. Parl.* vol. i. 291.

text-writers on the ancient common law. It must consequently comprise as well the beer manufactured for sale as the sheep. The verdict must be entered generally for the defendant.

Postea to the defendant.

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WOOLWAY v. ROWE.

TRESPASS quare clausum fregit. Plea: the general issue. The cause was tried before *Bosanquet, J.*, at the last assizes for the county of Devon. The question between the parties was, whether the plaintiff was the rightful owner of a piece of land adjoining his estate, consisting of about 100 acres, and called Scorrell Down, or whether it was, as the defendant contended, part of the waste belonging to the lord of the manor. The defendant offered to give in evidence, declarations of the party of whom the plaintiff had purchased the estate, made by him whilst he was in possession of that estate, and in which he had admitted that Scorrell Down was part of the waste of the manor, and that he had no interest in it beyond a right of common. This former owner was in Court at the time the defendant offered to give evidence of his declarations. Under these circumstances, it was objected that the declarations were not admissible, but the learned judge overruled the objection and received the evidence, subject however to a motion to this Court. The lord of the manor, who claimed to be the owner of the whole common, was then called. It was objected, on the part of the plaintiff, that he was an incompetent witness. The learned judge thought that even if the lord were interested, the objection was cured by the recent statute (*a*); and he therefore admitted him to give evidence. The lord then proved, that

(*a*) 3 & 4 Will. 4, c. 42, s. 26.

Declarations made by the owner of an estate against his own interest, are admissible in evidence against his vendee, although such vendor be alive, and even in Court, at the time that his declarations are proposed to be used.

In trespass quare clausum fregit, a person claiming to be owner of the locus in quo may be a witness to disprove the plaintiff's title.

Evidence of perambulations of a manor, made within living memory, is admissible in evidence upon a question of title to land, although neither the party against whom they are offered,

nor any person in privity with him, was present at the perambulation. But such evidence is entitled to very little weight.

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about sixteen years ago, shortly after he had purchased the manor, he placed a notice on the church door, stating that he intended to perambulate the estate which he had purchased, (and which included the common of which the locus in quo was said to form a part); that he did make a perambulation accordingly, and included within the boundaries the close in question. It did not appear that any person connected with the Scorrell (the plaintiff's) estate was present. It was objected that this evidence was inadmissible, but the learned judge received it. The jury found for the defendant, and in last Easter term


Follett moved for a new trial, on the ground of the reception of improper evidence. The *declarations* of a former owner, though made against his interest, are not admissible in evidence against a party who purchases from him, where he himself is *alive* and capable of being examined on oath. They may be receivable *after his death*, or they may be received even in his lifetime, provided there be identity of interest between the person who made the declarations and the party against whom they are so offered, that is, identity *at the time of offering the evidence*, for identity of interest at some former period is not sufficient. In *Barrough v. White* (a), which was an action by an indorsee against the maker of a promissory note, a question arose whether declarations made by *Arnett*, the payee, that he had given no consideration for the note, were admissible as against the indorsee, and *Banks v. Colwell* (b) was cited. *Abbott*, C. J., rejected the evidence, and the Court afterwards supported his decision. *Holroyd*, J., upon the motion for a new trial, said, "I am of opinion that the declarations were properly rejected. They could only be received as declarations against the interest of the party making them. But then the general rule is, that the party, *if living*, must be called; *Arnett* was still living at the time

(a) 6 Dowl. & Ryl. 379; 4 Barn. & Cressw. 325.


(b) Cited in *Brown v. Davis*, 3 T. R. 80.

of the trial." *Littledale*, J. also said, "It is a general rule, that where a person is living, and can be called as a witness, his declarations, made at another time, cannot be received in evidence."—"To this there are some exceptions; for instance, where the party making the declarations can be identified with him against whom they are offered. That was not done in the present case." It is believed that there is no case to be found in which evidence of this sort has been received. [*Parke*, J. You cannot cut down the title of the holder of a *negotiable instrument* by evidence of the declarations of a former holder, because he may have a better title than such former holder, by having given a *bonâ fide* consideration for it. I must say that in this case I should not have had any hesitation in receiving the evidence. I always thought that it was a general rule that the declarations of parties who are *privity in estate* are admissible.] That rule is certainly true, where the party is dead; but it is apprehended, that when he is alive he must be called, unless he be identified in interest at the time. In *Spargo v. Brown* (a), which was trover brought to recover the value of goods distrained, on the ground that the defendant was not the plaintiff's landlord, the plaintiff proved that he had paid rent to another person. The defendant tendered in evidence accounts rendered to him by that person, to shew that he had accounted for the very rents received from the plaintiff. It was held that the accounts were not admissible, the person who had rendered them being still alive, and capable of being a witness, and not identified with the defendant in interest. *Bayley*, J., there said, "The general rule is, that every material fact must be proved by testimony on oath. There is an exception to this rule, viz. that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence." The observations of *Littledale*, J. are to the same effect. The two exceptions there put are in effect much the same. The one is of a

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(a) 4 Mann. & Ryl. 688; 9 Barn. & Cressw. 935.

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party to the record, and the other is of a party (as a trustee, for instance,) who is so identified in interest with him, as to be substantially a party to the suit. Declarations of former owners of an estate, are not admissible against a present owner, where they are capable of being called to give evidence. [*Parke, J.* Declarations of a bankrupt are admitted to prove the petitioning creditor's debt, without shewing that they accompanied any act, and without reference to his being alive or dead (*a*).] The bankrupt is there identical with the assignees. There is no instance mentioned in the text books of such evidence as that which was admitted here being held receivable. [*Patteson, J.* I remember an attempt being made on circuit, to put in the declarations of a very old person, still living, as *evidence of reputation*, and the evidence was rejected, but upon a principle which does not at all apply here.]

Lord DENMAN, C. J.—We will take time to consider this question.

Follett. There are other grounds for a new trial. The lord of the manor was improperly admitted to give evidence, and the evidence which he gave was improperly received. He was an interested witness. [*Parke, J.* How can you say that he is interested *in the event of the suit*? I see no objection to his being admitted.] Evidence of a perambulation made by a party in the absence of those against whose interest such evidence is offered, cannot be admitted. [*Parke, J.* It was an act of ownership, done as a claim to the property. *Littledale, J.* To which the jury would pay very little attention. *Patteson, J.* It seems to me to be evidence, though of little weight.] It was mere evidence of reputation.

Lord DENMAN, C. J.—We will see my brother *Bosanquet* upon the case.

Cur. adv. vult.

(*a*) And see *Smallcombe v. Bruges*, *Macleland*, 45; more fully and accurately reported, 13 *Price*, 136.

A few days subsequently, the opinion of the Court was delivered by

Lord DENMAN, C. J.—Upon the first point,—as to the admissibility of the declarations of the former owner, we are of opinion that they were admissible, on the ground of an identity of interest. The circumstance of such former owner being still alive, does not, in our opinion, affect the admissibility of his former declarations, made against his interest at the time.

There was another objection—that proof was given of perambulations made in the absence of the party whose interest is sought to be affected by it. We are of opinion that this evidence, though of very little weight, was proper evidence to go to the jury. Therefore there must be no rule on either point.

Rule refused.

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WILKINSON v. BYERS.

ASSUMPSIT. The declaration stated that an action had been commenced in the Palace Court against *Wilkinson*, by one *Rimmer*, in the name of *Byers*, and as his attorney, to recover a certain sum of money, to wit, 13*l.* 10*s.*, alleged to be due from *Wilkinson* to *Byers*; and that in consideration that *Wilkinson* would pay *Byers* the said sum of 13*l.* 10*s.*, *Byers* promised *Wilkinson* to settle with *Rimmer* for the costs of the suit and to indemnify *Wilkinson*. Averment, that *Wilkinson* had paid, and *Byers* had accepted the said sum of 13*l.* 10*s.*, but that *Byers* did not settle with *Rimmer*; that *Rimmer* consequently proceeded with the action, and obtained judgment against *Wilkinson*, who was obliged to pay 7*l.* 16*s.* for costs of the action; but that *Byers*, though he had had notice, had refused to indemnify

After action brought to recover a debt unascertained in amount, the immediate payment by the defendant of a specified sum, although he does not deny that sum to be the amount due, is a good consideration for a promise, on the part of the plaintiff, to forego his costs.
So (per *Lit- tledale, J.*), although the amount of the debt be certain and admitted, and the sum paid be exactly the amount of the debt.

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Wilkinson. Plea: the general issue. At the trial before *Patteson, J.*, at the Middlesex sittings after Trinity term, 1833, it appeared that the original action had been for work and labour, goods sold, &c.; that at a time when the costs amounted to 1*l.* 4*s.* only, a conversation took place between *Wilkinson* and *Byers*, in which, as the witness stated, *Wilkinson* complained of the conduct of *Byers* as unjustifiable, in having commenced an action without having previously applied for payment; upon which *Byers* said that he had not authorized his attorney to do more than write a letter requiring payment of *the sum in dispute*, and expressed his regret that the attorney should have acted as he did. *Wilkinson* then offered to pay *Byers* the balance due to him, and proposed that *Byers* should himself settle with the attorney, to which the latter agreed. The sum of 13*l.* 10*s.* was paid by *Wilkinson* to *Byers*, and a receipt given by *Byers* "for 13*l.* 10*s.*, balance of account to this day." *Byers* refused to pay the attorney the costs then incurred, on the ground that he had not given him instructions to act as he had done; and the attorney, in consequence, continued the action until he obtained final judgment, under which *Wilkinson* was compelled to pay the costs to the amount of 7*l.* 16*s.* These costs *Byers* had refused to repay. *F. Kelly* applied for a nonsuit, on the ground that there had been no consideration for the promise; but the learned judge refused to nonsuit, and the case went to the jury, who found for the plaintiff. Leave was given to move for a nonsuit, and *F. Kelly*, in the following term, obtained a rule accordingly; against which, in Easter term,

Sir James Scarlett and *Platt* shewed cause. The objection resolves itself into a question upon the record; and upon the record it is clear that a good consideration appears, for there the sum of 13*l.* 10*s.* is not treated as a sum actually due, but only *alleged* to be due. [*F. Kelly.* The evidence shewed that it was a *real* debt.] It does not appear that the debt *was* due *beyond dispute*; but supposing

that it was so, what is more common than a compromise by which the defendant agrees to pay the debt, and the plaintiff agrees to call for no costs? How can it be said that this contract is void for want of consideration, when it is a contract of a description which the Court enforces every day. There is in fact good consideration for such a promise, though the whole demand be really due;—delay is avoided; extra costs are avoided; chances, as by the death of either one party or the other, are avoided. Immediate payment is a good consideration for a promise, on the part of a plaintiff, to pay his own attorney. This is not like the case of a creditor's saying—"You owe me 12*l.*—I will take 11*l.* in satisfaction of it." When a man embarks in an action, he is to some extent in the power of the defendant, who may, at all events, put off the payment until final judgment is obtained; and therefore the taking a smaller in satisfaction of a greater sum, before final judgment, is like the taking by a creditor of his debt minus the *discount*, in the case of a sale upon credit. There is no difference between such a promise and that which was given in this case. If there be *any* benefit gained by the immediate payment, that is sufficient. The Court will not inquire into the *adequacy* of it.

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F. Kelly, contra. There was no *compromise* between these parties, as the argument on the other side supposes. There was a mere payment of a debt *acknowledged* by the defendant to be due. It is said that it does not appear that the 13*l.* 10*s.* *was* due, yet in the conversation which was proved, it was not at all disputed that there was a balance of 13*l.* 10*s.* due. But then it is said, that the payment by the defendant *before final judgment* was a benefit, which might be a good consideration for a promise to pay costs. The question is not, as that argument assumes, whether the debt can *physically* be taken from the debtor without delay, but whether it is, in contemplation of law, *presently due*. In *Sethwyn's Nisi Prius* (a) it is said, "The mere

(a) 7th edit. 47, 8th edit. 48.

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performance of an act which the party was by law bound to perform, is not a sufficient consideration;" and *Ha v. Watson* (a), there cited, fully supports the proposition [Littledale, J. In *Reynolds v. Pinhowe* (b) the declaration stated, that "whereas the defendant had recovered pounds against the plaintiff, in consideration of pounds given him by the plaintiff, the defendant assumed to acknowledge satisfaction of that judgment before a day, and that he had not done; and it was thereupon murmured; for it was moved that there was not any consideration, for it is no more than to give him part of the money which he owed him, which is not any consideration. Finally the Court held it to be well enough; for it is a benefit unto him to have it without suit or charge; and it may be that there was error in the record, so as the party might have avoided it.] Undoubtedly, where there is a possibility there being an error on the record, or where there is a doubt as to the sum being the debt due, there is good consideration to support a promise. Here, there is no doubt because at the time of paying the amount the party acknowledged it to be the debt due. [Parke, J. You do not make out that before action brought Byers had a specific claim upon Wilkinson for the sum of 13l. 10s. Your declaration only shews that Wilkinson paid the amount for which the action had been brought. It is consistent with the declaration that the action in the Palace Court was for unliquidated damages. Suppose the action had been for an unascertained sum on the quantum meruit, (which is very probable, as the action was for work and labour,) and the

(a) Peake's N. P. C. 72.

(b) In K. B., Cro. Eliz. 429; S. C. per nomen *Reynolds v. Pinhowe*, Sir F. Moore, 412, where the ground of the judgment is stated to be—"quia speedy payment excuseth travail and expense of suit." S. C. 1 Roll. Abr. 28, (translated in 1 Vin. Abr. 316, pl. 54).

But a similar judgment, given in this Court, in a case of *Dixon v. Adams*, in the following year, was reversed, per totam Curiam, in the Exchequer Chamber; vide *Dixon (Dixon) v. Adams*, Cro. Eliz. 538; *Adams v. Dixon*, Sir F. Moore, 710; *Dixon v. Adams*, Goldsb. 156; Vin. Abr. 316, pl. 55.

defendant had paid the amount stated in the count on condition that the plaintiff would pay his costs,—would there not be good consideration for a promise to pay such costs? You may always take less in satisfaction of a greater sum, except where the debt is reduced to an *absolute certainty*.] If the party admits the amount due, there can be no question on the quantum meruit, for in contemplation of law the amount proved under the quantum meruit was specifically due before action brought. [*Patteson, J.* It is necessary that at the time when the action was brought there should be no possibility of dispute as to the amount; there should have been a sum *certain* upon a *specific* agreement. This sum is given in full satisfaction of debt and costs. I agree that the payment of a less sum for a larger sum, the amount of which is *ascertained*, is not satisfaction. Lord *Mansfield*, indeed, did not admit that, but it is generally thought to be the law (*a*).] If the plaintiff had said—"If you will pay me what you owe me, I will pay my own costs," that agreement would have been bad. Looking at the declaration and evidence together, that appears to have been precisely the nature of this agreement, for the sum paid is admitted to be the sum due. [*Parke, J.* You must have a certainty before action brought.] It was paid as the sum originally due.

The verdict ought, at all events, to be reduced to 1*l.* 4*s.*

LITLEDALE, J.—In giving my opinion, I would rather put this as a sum of money actually due; and taking it even in that way, I say that the plaintiff is entitled to recover. I referred in the course of the argument to *Reynolds v. Pinhowe*, which is a direct authority to shew that the plaintiff is entitled to recover. There is also the case of *Dixon v. Adams*,—also in *Cro. El. (b)*,—which, as far as it goes, is in favour of the *defendant*. The nature of the

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(*a*) Vide *Fitch v. Sutton*, 5 East, 230, 1 Smith, 415; *Steinman v. Magnus*, 11 East, 390; Mann. N. P. Digest, 2d ed. 162, pl. 12, n. (b) *Cro. Eliz.* 538; as to which, see *ante*, 856.

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promise in that case makes it distinguishable from the present; for that was a promise to do a *collateral* thing, and there was no consideration for *such* a promise. Here, the promise amounts to this;—"You have sued me for a sum which I know to be due, but you will have some difficulty in recovering it; I will, in consideration that you will forego your costs, pay the debt *now*;" and the other says—"In consideration of your paying the debt *now*, I will indemnify you against the payment of my costs." If the present defendant once agreed to forego his costs, he could not go on with the action, which could only be proceeded with for the purpose of obtaining costs which he had agreed to forego. The agreement on the part of the plaintiff was only to stand where he was. I think that the Court would after an agreement of this sort had been entered into, put an end to the proceedings in the action; for to attempt to carry them on would be a breach of good faith. The rule ought therefore to be discharged.

PARKE, J.—I also am of opinion that this rule must be discharged. I do not think it necessary to put my judgment upon the ground upon which my brother *Littledale* has decided, though I by no means say that I disagree with what he has said. I put it upon the short ground mentioned by me in the course of the argument;—that this was a payment of a *specific* sum in satisfaction of an *unliquidated* demand; and this is a good consideration for a promise to pay costs. *Prima facie*, the action was for an *uncertain* demand; and I think the party failed to shew by evidence that it was for a *certain* amount. It does not happen in one case out of a hundred—indeed scarcely ever—that there is demand for a *specific* sum for *work and labour*; and very often the extent of a demand for *goods sold* is not precisely ascertained. The plaintiff's demand must be *specific, before action brought*, in order to make the payment of the amount claimed a bad consideration for a promise.

PATTESON, J.—I also am of opinion that this rule must be discharged. The objection could only be taken in arrest of judgment, or upon motion for a nonsuit. Now, upon the supposition that the motion was in arrest of judgment, I think that the defendant would be out of court; because the declaration says that the former action was brought for a certain sum of money, to wit, 19*l.* 10*s.*, *alleged* to be due. But then it is said, that in point of *fact* the sum was *certain*; that therefore the payment of it could form no consideration for a promise, and that therefore the defendant is entitled to a *nonsuit*. Mr. *Kelly* says that the witness stated that *Wilkinson* admitted 19*l.* 10*s.* to be the balance due; but the same witness proved that *Byers* had said that he had not instructed his attorney to sue, but had told him to write a letter requiring payment of the sum *in dispute*. It does not seem to me to have been *clear* that 19*l.* 10*s.* was a settled or admitted amount, and therefore I think there cannot be a nonsuit. I do not say that I differ from my brother *Littledale* as to what the law would be if the amount were actually certain, but it does not seem to me to be necessary to go so far. I do not know what my opinion would be, but I will not say that I differ.

Then, Mr. *Kelly* says that the plaintiff ought only to recover 1*l.* 4*s.*; but it is through his own act that greater costs are incurred, for by refusing to pay that sum to the attorney, the attorney was obliged to go on with the action in order to get his costs.

Rule discharged (*a*).

(*a*) *Greenleaf v. Barker*, Cro. Eliz. 193, 1 Leon. 238; *Anon.* 1 Roll. Abr. 28, pl. 53, (translated in 1 Vin. Abr. 315, pl. 53). And see *Bagg v. Slade*, 3 Bulstr. 162, 1 Roll. Rep. 354, 1 Roll. Abr. 20, pl. 15, (translated in 1 Vin. Abr. 305, pl. 15,) 1 Jenk. 324, pl. 27; *Longridge v. Dorville*, 5 Barn. & Ald. 117, 2 Mann. & Ryl. 482, n.; *Travers v. Meers*, T. Raym. 32; *Traver v. —*, 1 Sid. 57; *Travis v. Meers*, 1 Keble, 163.

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In the matter of Arbitration between LEE and
HEMINGWAY.

Where, in articles of agreement for the sale of land by A. to B., it is stipulated that the price shall be fixed by an arbitrator, and the agreement be made a rule of Court, the award being published and the agreement made a rule of Court, A. cannot have an attachment against B. for non-payment of the price awarded.

A.'s only remedy is by action on the articles.

BY articles of agreement under seal, entered into for purpose of settling certain differences between the parties it was covenanted that *Hemingway* should purchase certain lands and shares in mines belonging to *Lee*, at a price to be determined by A. and B., who were to make their award before a certain time; *Lee* covenanted to make out a perfect abstract of title at his expense, and to execute a conveyance upon payment of the price fixed by the award. The agreement was made a rule of court. A. and B. in respect of one portion of the property awarded 14,000*l.* and in respect of another, 200*l.* The money was demanded by *Lee*, and a conveyance tendered by him to *Hemingway*, but the latter refused to pay the price assessed by the arbitrators.

R. V. Richards now moved for a rule nisi for an attachment against *Hemingway*. The agreement is a contract for purchase, and the arbitrators are only to assess the amount to be paid; but it is submitted that it is a case in which the court will grant an attachment. [*Littledale, J.* The agreement is hardly within the statute of *William*(a). The price which is said about the price is not the primary part of the agreement, as the statute contemplates (b). You cannot

(a) 8 & 9 *Will.* 3, c. 15.

(b) The statute authorizes "all merchants, traders and others, desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration to agree, that their submission of their suit to the award or umpirage of any person or persons, shall be made a rule of any of his majesty's courts of record," &c. The authority here given is ex-

pressly confined to controversies or quarrels existing at the time of the submission, and then the proper subject of a personal action or suit in equity; whereas at the time of the submission in the principal case, although some differences had existed between the parties, the matter submitted was one respecting which there was no question between the parties except that raised by the submission itself.

have the attachment, but you can bring your action (a); so that you are not without remedy. *Parke, J.* Even supposing that we had the *power*, this is not a case in which it would be *fit* to issue an attachment.]

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Per Curiam.

Rule refused.

(a) Namely, an action of covenant, on the articles of agreement.

MARSTON v. DOWNES and Wife, Executrix of JOHN VAUGHAN, deceased.

ASSUMPSIT upon a simple contract debt of the intestate. Plea: plene administravit. Replication: that at the time of the commencement of the suit (*and since that time*) (a) the executrix had divers goods &c., wherewith &c.

At the trial at the last assizes at Shrewsbury before *Patteson, J.*, the plaintiff proved that assets to a certain amount had come into the hands of the executrix, and the defendants proved payment of bond debts to the amount of those assets. The plaintiff then called as a witness *A.*, an attorney, who had been served with a subpoena duces tecum, and required him to produce two deeds,—the one a conveyance by the testator to the husband-defendant *Downes*, on trust to raise money for the payment of debts,—and the other a mortgage executed by *Downes*, as such trustee, to a client of *A.*, for a considerable sum of money. *A.* refused to produce the deeds, but was required by the learned judge to give parol evidence of the contents of them, although it was objected that such evidence was inadmissible. His lordship, however, gave the defendants leave to move for a nonsuit upon the question of the admissibility. It was shewn that the money raised by this mort-

Upon plene administravit pleaded by an executrix and her husband (joined for conformity), it is competent to the plaintiff to shew that debts, alleged to have been paid by the executrix out of the assets, were in fact paid by the husband out of the proceeds of land conveyed to him by the testator for the payment of debts.

In an action by *A.* against *B.*, *B.* cannot object to the production of the title deeds of *C.*

Nor, if *C.* refuses to produce them, can *B.* object their contents.

(a) The safer course is to add these words.

to the reception of parol evidence of

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gage had been paid to *Downes* shortly before the payment of some of the bonds. The deeds and the last-mentioned fact were given in evidence with a view to shew that some of the bond debts had been paid by the husband out of the money advanced upon the mortgage, and not with the money shewn to have come to the administratrix as assets. The learned judge told the jury that if they believed that the payment had been made out of the money raised by *Downes* upon mortgage, they ought to find for the plaintiff; but that if they thought that the bonds had been satisfied out of the assets which had come to the hands of the administratrix, their verdict must be for the defendants. The jury found a verdict for the plaintiff, and (an objection having been made by the defendants' counsel) the learned judge gave the defendants leave to move to enter a verdict for themselves, if this Court should think that his direction was erroneous. In Easter term,

Ludlow, Serjt. moved accordingly for a nonsuit, or for a verdict for the defendants. The issue is, whether the executrix had or had not, at the time of the commencement of the suit, assets in her hands, unadministered; and under this issue, it is submitted that evidence of the receipt of money by the executrix, otherwise than in the character of executrix, was irrelevant. Debts had been paid to the extent of the legal assets. The husband was entitled to retain out of the assets any sums advanced by him out of the trust funds, for the payment of debts to which the executrix was liable;—as an executor may retain out of the assets the amount of money of his own advanced in payment of debts due from the estate. [*Parke*, J. You must shew an authority for this,—that the trustee, supposing him to be a *third party*, might call upon the executrix to refund out of the assets, advances made by him out of the trust fund.] It is apprehended that he might; and certainly the circumstance of the husband's being joined with his wife for conformity cannot alter those rights which they have

in their respective characters of trustee and executrix. The effect of holding that the question left to the jury was proper to be left to them, would be, to make the nature and amount of *trust* property cognizable in a court of *law*, upon a question of *plene administravit vel non*.

Upon the other point the defendants are entitled to a nonsuit. *A.* refused to produce the deeds, and the learned judge thought he could not force him to do so, but his lordship required him to give secondary evidence of its contents. It is quite clear that in this case *A.* could not have been compelled to produce his client's deeds. To compel a party to give secondary evidence of the contents of the deed which he is not bound to produce, would, in fact, be absolutely to repeal the law which gives him the privilege of refusing to have it read.

Cur. adv. vult.

On a subsequent day in the term,
Lord DENMAN, C. J. stated that the Court were of opinion that the direction of the learned judge was correct,—and that the objection that the *mortgagee* was privileged from having parol evidence given of the contents of the deeds, did not lie in the mouth of the *defendant*; and that therefore the defendant was not entitled to a rule.

Rule refused.

GALE v. CAPRON.

ASSUMPSIT. Plea: set-off upon a promissory note made by the plaintiff for 100*l.* and interest, payable to *Catford*, and duly indorsed to the defendant by one *Pyne*, who was then administrator cum testamento annexo, to *Catford*. Replication: that the supposed debt and cause of *A.* Replication: that the cause of set-off did not accrue within six years. The making of the note, the grant of administration, and the indorsement, are admitted; and the defendant has merely to shew an acknowledgment within six years.

Plea: set-off upon the plaintiff's promissory note payable to the order of *A.*, and indorsed to the defendant by the adminis-

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of set-off did not accrue to the defendant within six years in manner and form &c. At the trial before *Bosanquet, J.* at the last spring assizes for the county of Devon, the plaintiff proved a debt less in amount than the note mentioned in the plea of set-off. The defendant then produced a note corresponding to that stated in his plea, which was dated in February 1826, more than six years before the commencement of the action, but upon which there were acknowledgments of the receipt of interest within that period, purporting to be written by, and proved to be in the hand-writing of, *Catford* the payee. The plaintiff's signature to the note appeared to be attested by a subscribing witness, and the note appeared to be indorsed by *Robert Pyne* to the defendant. Neither the subscribing witness nor any other was called to prove the execution and delivery of the note; nor was any evidence given of the *indorsement* by *Pyne*, or of his possessing the character in which it was alleged by the plea that he indorsed the note. It was objected, that such evidence ought to have been given; but the learned judge was of opinion that evidence of the indorsements of the receipt of interest within six years, in the hand-writing of the payee, was all that was required in maintenance of the issue joined upon the replication; and the defendant had a verdict, subject, however, to a motion for entering a verdict for the plaintiff. In last Easter term,

*Moody* moved accordingly. The question is, whether the pleadings admit all the matters relating to the title to the note itself, so as to dispense with all proof but that of the indorsements of the payment of interest. A plea of the statute of limitations is no admission whatever of any right of action. Mr. *Starkie* lays it down (a) that where the statute of limitations is pleaded, "two circumstances must be proved in order to take the case out of the statute, by any admission:—1st, that a debt *at one time existed*; 2ndly, that it remained unsatisfied within the six years."

(a) Stark. Evid. 1st edit. Part ii, 895; 2nd edit. vol. ii, 482.

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This replication does not, at all events, admit any thing *subsequent* to the indorsements of the receipt of interest, even though it should be taken to admit the existence of the note, so as to dispense with the necessity of calling the subscribing witness. Therefore it does not admit the indorsement by *Pyne*, or that he had any authority to indorse. If this had been an action by an indorsee of a promissory note, and the declaration had stated the same facts as the plea in this case, a *plea* that the cause of action did not accrue to the *plaintiff* within six years in manner, form, &c. would have operated as a plea of the statute of limitations, and a traverse of the fact of *Pyne's* being administrator. [*Patteson, J.* Does not a plea, that the right of action did not accrue *within* six years, admit that it did accrue *beyond* the six years? It seems to me to amount to an assertion to that effect.] That would be so in an ordinary case, in which the right of action claimed by the party accrued to him before the act which takes the case out of the statute was done. Here, the right of the party has accrued since. [*Patteson, J.* That arises out of the *negotiable* nature of the instrument. Your argument would go to shew that where any bill more than six years old is taken out of the statute by some acknowledgment and indorsed afterwards, the indorsee should not be allowed to take advantage of such acknowledgment. The misfortune, in the case of a plea of set-off, is, that the plaintiff cannot *reply* double, whereas in the case of an *action* brought upon the same cause of action, he might *plead* double. Here, the party might have traversed the administration (a).] The words of the replication do not admit that *Pyne* was the administrator. The replication might perhaps have been demurred to for duplicity. [*Little-*

(a) *Quere*, whether the defendant should not either have made *proffert* of the letters of administration, as in a *declaration*,—or have stated the *authority* of the ordinary to grant administration, as in a *plea in bar* or a *replication*. *Bingham v. Smeathwick*, Cro. El. 456; *Temple v. Temple*, ib. 791; *Churd v. Bird*, ib. 838.

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dale, J. I think the defendant could not have demurred to this replication.]

*Cur. adv. vult.*

Lord DENMAN, C. J., on a subsequent day in the term, after stating the pleadings, said, that the Court was of opinion that the learned judge was right in requiring proof merely of the indorsements of the payment of interest within six years; for that the other matters were impliedly admitted by the pleadings.

Rule refused.

SHORTREDE v. CHEEK.

“You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount, together with the memorandum of my son's,—making in the whole 45*l*.:”—Held, in an action on this guarantee,—first, that the memorandum referred to need not be produced; secondly, that a sufficient consideration appeared upon the face of the guarantee; thirdly, that the plaintiff was entitled to recover for the whole 45*l*. upon producing a promissory note, made by the defendant's son, for the payment of 35*l*., and proving that he had withdrawn it,—there being no evidence of any other note, drawn by either the defendant or his son, having been at the time of writing the letter in the possession of the plaintiff.

**ASSUMPSIT.** The first count of the declaration stated, that on 28th January, 1832, one *Henry H. Cheek* made his promissory note, whereby he promised to pay plaintiff 35*l*. at three months after date, and that the said *Henry H. Cheek* was, at the time of making such promise, indebted to the plaintiff in the amount of the said note; and also that the said *Henry H. Cheek* was further indebted to plaintiff in a certain other sum, to wit, 10*l*., for which he had delivered to plaintiff a certain written memorandum, dated 28th January, 1832, whereby he acknowledged to have received of the plaintiff on that day the said sum of 10*l*., which he promised to return that day month; and that upon 11th May, 1832, in consideration of the premises and that the plaintiff, at the request of the defendant, would withdraw the said note, the defendant promised the plaintiff to see him at Christmas next, when the plaintiff should receive from the defendant the amount of the said note,

together with *the amount of the said memorandum*, making in the whole the sum of 45*l.* Averments: that the plaintiff had withdrawn the said promissory note, and had forborne and given time to the said *Henry H. Cheek* for payment of the said debts, but that he, although requested, had not paid the same, whereof the defendant had notice. Breach: after stating that the Christmas next after the time of making the promise had long since elapsed, that the defendant had not yet paid to the plaintiff *the amount of the said promissory note and memorandum, or either of them*, and that the same still remained due and unpaid.

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The declaration contained a second special count, which it is not necessary to particularize, and the money counts.

Plea: non assumpsit.

At the trial before *Denman*, C. J., at the Middlesex sittings after last Hilary term, the plaintiff produced a promissory note for 35*l.*, dated January 28, 1832, and signed by *Henry H. Cheek*, and also the following letters, dated respectively 11th May, 1832, and 10th January, 1833, in the handwriting of the defendant, and addressed to the plaintiff:

"You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, *together with the memorandum of my son's*, (i. e. *Henry H. Cheek's*,) making in the whole 45*l.*"

"I was with my son yesterday, who intends shortly to be in Edinburgh with the means to discharge your account. I am under obligation to you for the kindness I experienced when I called upon you, as well as to discharge the 45*l.* due from my son, with interest, without a day's delay."

The memorandum referred to in the letter of the 11th May was not produced; and for this reason, and also on the ground that the first letter did not state any *consideration* for the guarantee, the defendant applied for a nonsuit.

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The jury found that the first letter referred to the promissory note, and returned a verdict for the plaintiff for 47*l.* 10*s.*, under the direction of the lord chief justice, who, however, gave the defendant leave to move for a nonsuit. In last Easter term,

*G. T. White* moved accordingly.

First point:  
 Non-production  
 of memorandum.

I. The memorandum ought to have been produced. It did not appear by the letter of the 11th of May what was the amount or the subject-matter of the memorandum, or what was the amount of the note. If this had been a declaration on a promissory note, and judgment had gone by default, it would have been necessary to produce the note in order that it might be seen if any thing had been written on the note. For the same reason it was necessary here to produce the memorandum. *Bevis v. Lindsell* (a) was an action on a promissory note, in which judgment had been taken by default. Upon the execution of a writ of inquiry, the plaintiff produced the note, but instead of calling the subscribing witness, offered other evidence that it was in the defendant's hand-writing. The Court held the evidence sufficient; "for the note being set out in the declaration, is *admitted*, and the only use of producing it is, to see whether any *payment* is indorsed upon it." In *Green v. Hearne* (b) it was urged, upon motion to set aside an inquisition in an action against the acceptor of a bill of exchange, that the bill, though *produced* before the jury, was not proved; but the Court held that the acceptance was admitted; and *Buller, J.*, said "the only reason of producing the bill is, to see whether any part of it is paid." [*Parke, J.* It is customary to indorse part payments on bills of exchange and promissory notes; and that is the foundation of the rule. The reason does not apply to *other* written instruments.]

Second point:  
 Non-appearance  
 of consideration.

II. Considering the latter as a guarantee, it is void for

(a) 2 Stra. 1149.

(b) 3 T. R. 301.

want of sufficient consideration, expressed on the face of it, to satisfy the statute of frauds. In *Jenkins v. Reynolds* (a), *Saunders v. Wakefield* (b), *Wain v. Warlters* (c), the Courts have stated the intention of the legislature to be, to exclude parol evidence in cases of this description. In *Jenkins v. Reynolds*, the guarantee addressed to the plaintiff by the defendant was as follows: "To the amount of 100*l.*, be pleased to consider me as security on Mr. *James Cowing* and Co's account." *Richardson*, J. in that case said "Here, as the letter written by the defendant does not disclose whether the promise was made by him for a past or future consideration, nor the cause for which it was given, if parol testimony were allowed to explain either of those circumstances, it would let in the mischief which it was the express object of the legislature to obviate and prevent when the statute was passed." This guarantee does not disclose whether the consideration is past or future. The consideration ought to appear with certainty on the face of the instrument, without the necessity of resorting to parol evidence. It may be said that there is a consideration here stated, namely, the withdrawal of a promissory note; but that is not sufficient, as it does not appear on the face of the letter *what* promissory note was to be withdrawn. It does not appear by whom it was made, or what was its amount. [*Parke*, J. It appears on the face of the letter, to be a promissory note held by the plaintiff.] It does not appear that the note was given by the son. [*Parke*, J. The guarantee must be viewed in connection with the state of facts proved to have existed at the time when it was entered into.] The question is, whether there is enough expressed *in writing* to satisfy the statute of frauds. No parol evidence is admissible for the purpose of explaining that something on the face of the instrument is intended as a statement of a consideration. The *consideration* for the promise ought distinctly to

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(a) 6 B. Moore, 86; S. C. 3  
Brod. & Bingh. 14.

(b) 4 Barn. & Alders. 595.  
(c) 5 East, 10; 1 Smith, 299.

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appear upon the face of the instrument. [Parke, J. The letter says, "you will be so good as to withdraw the promissory note," that is, the note in your possession. Suppose the letter had referred to "the hogshead of tobacco in your possession;" would that have been an insufficient description? There is no necessity for describing the note in such a way that upon the face of the instrument it should appear impossible that any but one specific note was intended to be referred to. If that were required, it would not even be sufficient to set out the note at length; for it would be objected—non constat that there is not another note precisely similar. Parol evidence must of necessity be admitted in order to shew to what the guarantee applies.]

LITLEDAL, J.—I am of opinion that the consideration sufficiently appears. If there had been *two* promissory notes, the one given by the father, the other by the son, it could not have been shewn by parol evidence to which the guarantee was applicable. So, if there had been two promissory notes given by the son, parol evidence would have been inadmissible to show which was intended to be referred to. But here there was but one promissory note to which the guarantee *could* apply. I think that the consideration for the promise is sufficiently apparent on the face of the guarantee, and that there ought therefore to be no rule.

PARKE, J.—There is no question but that a sufficient consideration is expressed on the face of the guarantee. The effect of the defendant's letter is this: the defendant requests the plaintiff to withdraw the promissory note in his possession, and promises, on his so doing, to pay the amount, together with the amount due upon a memorandum given by his son. There can be no doubt that the giving up of any note in the plaintiff's possession would be a sufficient consideration for the promise. The con-

sideration being *executory*, the plaintiff is bound to shew that he has executed it; and for that purpose he must prove that the promissory note given up by him was *the* note referred to by the agreement. Had there been *two* promissory notes, the difficulty suggested by my brother *Lit- tledale* would have arisen. There is however in this case but one promissory note; and it is therefore clear that the plaintiff has fulfilled the agreement on his part.

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Lord DENMAN, C. J. concurred (a).

Rule refused.

(a) *Patteson*, J. was sitting at Nisi Prius in London.

AVRIL v. The SHERIFF of WARWICK and others.

**TROVER** to recover the value of goods taken under an execution, before *Tindal*, C. J. at the spring assizes for the county of Warwick, in 1834.

The defendant's officers, having a *fi. fa.* against one *Cooper*, and hearing that some of his goods had been removed to *Avril's* house, seized the goods in question there. *Cooper's* goods were removed to *Avril's* house under colour of an assignment from *Cooper* to *Avril*. To prove that, subsequently to the time of the execution of the deed of assignment, *Avril* had no goods of his own, the bailiff of the preceding sheriff was called, who stated that he had sent his followers to search for goods of *Avril* to satisfy two writs of *fi. fa.* against *Avril*, that no goods were found, and that he had indorsed the writs to that effect. These two writs, with the return of the sheriff of *nulla bona*, were also put in. The admission of this evidence was objected to on the part of the plaintiff. The Lord Chief Justice admitted the evidence, and a verdict was found for the defendant.

A return of *nulla bona* made by the sheriff to a *fieri facias* against *A.* is admissible in evidence upon the trial of a question as to property in goods at the time of such return between *A.* and a succeeding sheriff. So, although the bailiff entrusted with the execution of such writ did not himself search for goods of *A.*, but sent his assistant.

*M. D. Hill* now moved for a new trial, on the ground



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that the evidence was improperly received. The evidence was inadmissible, as the *bailiff* did not ascertain that *Avril* had no goods to satisfy the writs, but sent *his followers*. He was therefore, in effect, giving evidence of what was detailed to him by another person. The person who actually made the search should have been called. The mere fact of a return of *nulla bona* is not, under these circumstances, sufficient. [*Parke, J.* In *Gyfford v. Woodgate* (a) it was held that the sheriff's return indorsed on a writ is *prima facie* evidence of the facts returned. It is difficult to contend that the return is not *some* evidence. The principle is, that it is the return of a *public officer*.] Returns are frequently made in consequence of an arrangement between the sheriff and one of the parties to a suit. [Lord *Denman, C. J.* That argument was pressed in *Gyfford v. Woodgate*. Lord *Ellenborough* was of opinion that the return was *prima facie* evidence of the facts stated in it, upon the ground that faith was to be given to the official act of an officer, even where third persons were concerned.] If the return only had been put in, it might be conceded that it was *prima facie* evidence, but the authority of the return is falsified. It was the duty of the bailiff to have searched himself for the goods.

LORD DENMAN, C. J.—It is very slight, but it is evidence. We will, however, see my brother *Tindal*.

On a subsequent day, his lordship said that he had spoken to Lord C. J. *Tindal*, who saw no reason for disturbing the verdict.

Rule refused.

(a) 11 East, 297. In that case, in evidence by the party objecting however, the writs were produced to the admissibility of the return.

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REEVE v. DAVIS and others.

**ASSUMPSIT** for goods sold and delivered. Plea: the general issue. At the trial before *Denman*, C. J., at the sittings in London after Trinity term 1833, it appeared that this was an action brought by an ironmonger resident in London, to recover from parties who reside in Liverpool, 50*l.* 6*s.* 7*d.* for goods furnished in London to the captain of the "*Ormrod*" steam-vessel, for the repair of the vessel and engine. It was admitted that the goods were necessaries for the vessel, and that the defendants were the registered owners. A charter-party, dated 4 July 1831, was given in evidence by the defendants, purporting that *Davis*, on behalf of himself and the other owners, let the vessel to *Thompson* the captain for one year, *Thompson* covenanting to keep the whole of the vessel in repair except the steam-engine, and to indemnify the defendants from all charges in respect of the vessel; and the owners covenanting to keep the engine in repair, and reserving the right of appointing an engineer. The defendants paid 16*l.* into Court, to cover such part of the bill as consisted of articles furnished for repairing the engine, and it was objected that *Thompson*, and not the defendants, was liable to pay the residue of the bill. The Lord Chief Justice was of opinion that the defendants, as owners, were liable, and that the charter-party was no answer to the action. A verdict was found for the plaintiff, with leave to the defendants to move to enter a nonsuit. *F. Kelly* accordingly, in Michaelmas term following, obtained a rule nisi; against which, in Easter term,

The registered owner is not liable for articles furnished without his order for the repair of a vessel chartered for a year by a party who has undertaken to repair the ship during that term.

Nor, when there is no charter-party, unless the goods were ordered by the agent of the owner, or were beneficial to him.

The registered owners of a steam-boat let it to *A.* the captain, for one year, the boat to be repaired by *A.*, the engine by the owners, who are to appoint an engineer. Held, that the owners are not liable for repairs ordered by *A.* unconnected with the engine.

*Busby* shewed cause. The ruling of the chief justice was right. It is assumed by the defendants, that by the charter-party all interest in the vessel passed from them to *Thompson*, and that they are therefore not liable for stores furnished for the use of the vessel. But consider-

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ing that the engine was to be repaired by the owners; that they were to appoint the engineer, and that *Thompson* covenanted to keep them *indemnified* from all charges in respect of the vessel, it is clear that it was never intended that the owners should exercise *no control* over the vessel during the year. There was not, in fact, such a complete parting with all control over the vessel as to bring this within the authority of those cases which have decided that where the owners have parted for a time with all control over the vessel, they are not liable for stores furnished during that time. It is questionable whether *Davis*, who was only a part-owner, had a right to demise the *whole* of the vessel; and if he had not, the demise, as between the plaintiff and the defendants, was inoperative. Again; although there is apparently a letting for one year, yet the subsequent provisions which have been adverted to, shew that that was not the intention of the parties. *Christie v. Lewis* (a) shews that, notwithstanding the words of letting import a *transfer*, yet the party will not be invested with the entire control over a ship if the charter-party also contains covenants or provisions inconsistent with such a construction. There is but one case in which it was clearly held that the owner was exempted by the making of a charter-party, viz. *Fraser v. Marsh* (b). There, the whole of the vessel was demised; here, the owners have undertaken to keep the *engine* in repair. *Primâ facie*, the owners are liable; and it is for them to get rid of that liability by *positive* evidence. [*Patterson, J. Briggs v. Wilkinson* (c) determined that the mere fact of ownership did not render a party liable.]

*F. Kelly* in support of the rule. It is admitted that *primâ facie* the captain is the *agent* of the owners; but the moment it appears that the vessel has been *let* to the captain, he is no longer to be considered as such *agent*.

(a) 2 Brod. & Bingh. 410; S. C.  
5 B. Moore, 211.

(b) 13 East, 238.

(c) 7 Barn. & Cressw. 30.

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Then the question is, *with whom* the contract was entered into. The owners in this case lived at Liverpool, and had no dealings with the plaintiff, who carried on his business in London. The goods were ordered by *Thompson* in London. By the charter-party the legal interest of the owners was passed for one year. It is true, there is a clause with respect to the engine which reserved to the defendants, *quoad hoc*, some control; but the demise of the vessel is for a term certain. *Thompson* ordered goods for that part of the vessel which he was bound to repair. *Thompson* ordered them for his own benefit. In *Young v. Brander (a)*, in which, after a sale of a ship, the legal title remained, through the negligence of the vendee, in the vendor for a month, it was held that the vendors were not liable, during that interval, for repairs ordered by the captain under the direction of the vendee. Lord *Ellenborough* there said, "It is true that the owners of a ship are liable for repairs ordered for them or *for their benefit* by their master, but it was never heard of that if a stranger ordered repairs for another's ship or carriage, the owner was liable for such repairs." The question therefore is, were these goods ordered *for the benefit* of the defendants? None of the goods were furnished for their benefit, except those articles furnished for the repair of the steam-engine; and to cover that part of the demand, money was paid into court. *Frazer v. Marsh* shews that the only ground which renders the owners liable is, that the captain is the *agent* of the owners; but after the vessel is *chartered* to the captain, *that* relation no longer exists. *Frazer v. Marsh* has never been overruled, and is not distinguishable from the present case. The owners are no more liable for repairs done to the vessel than a *landlord*, who has demised a *house* for one year to a tenant who covenants to keep the premises in repair, would be liable for repairs done to the *house* by the directions of the tenant.

(a) 8 East, 10.

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LORD DENMAN, C. J.—The question in this case is, *who ordered* the goods? Where a ship is hired from the registered owners by other parties whose agent orders the goods, the owners are not liable. This case is similar to that; nor is it different from the case of a *landlord* who demises a *house*, the tenant covenanting to repair.

LITLEDALE, J.—It is a *general* rule that the captain *and owners* are liable for repairs done to a ship. The question is, who are to be considered as *owners* at the time when the goods were furnished. It is said that the persons on the register are to be so considered; that is not necessarily so: the *register acts* were passed for a different purpose. The register is *one* mode of obtaining information as to who is the owner; but it is not the *only* means. A tradesman may inquire of the captain as to the owners, and if he does not give him satisfactory information, he may refuse to deal with him.

If what is furnished be for the *benefit* of the *owners*, they are liable. Every thing here was for the benefit of the *charterer*; he therefore is the party liable.

PATTESON, J.—The effect of the register as to the liability of the registered owners was considered in *Briggs v. Wilkinson*; and the effect of that decision was, that in cases of this description you are to consider who are the *contracting* parties, and that the *register* is of no effect. Here, when we examine the charter-party, we find that the *charterer* is bound to repair every thing except the steam-engine; and for articles furnished for that purpose money has been paid into Court. *Thompson* was not the agent of the owners *in point of fact*—then was he their agent *in point of law*? The goods he ordered were for *his own* benefit; and *Young v. Brander* shews that the *mere legal owner* is not liable, if the goods are not ordered by him or for his *benefit*. *Frazer v. Marsh* goes the full length of this case. Another circumstance was relied

upon, viz. that this was a charter under seal which *Davis* had no authority to make; but *Young v. Brander* shews that it is not necessary that the title of the assignee should be complete to relieve the owner from liability.

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WILLIAMS, J. concurred.

Rule absolute.

The KING v. The Mayor of OXFORD (a).

AN action by *Sammons* against *Grafton* was brought in the Mayor's Court at Oxford, and the plaintiff obtained a verdict for 3*l.* 4*s.* 4*d.* Subsequently the mayor granted, first a rule nisi, and afterwards a rule absolute for a new trial, on the ground that the verdict was *against the weight of evidence*.

An inferior Court cannot grant a new trial, except on the ground of fraud, or irregularity in obtaining the verdict.

Upon an affidavit stating these facts, *Chilton*, for the plaintiff, obtained a rule to shew cause why a mandamus should not issue to the Court below, commanding them to proceed to judgment upon the verdict obtained in this cause, and why the defendant should not pay the costs of this application. The rule was moved for on the ground that an inferior court has no power to grant a new trial, except for irregularity.

*F. Kelly* now shewed cause. The authority for the position that an inferior court may grant a new trial for irregularity, but not upon the merits, is *Com. Dig.* tit. Court (Q.) This position is not supported by any case. *Blackquiere v. Hawkins* (b), *Bayley v. Boorne* (c), and *Rex v. Peters* (d), which appear to be the only cases which can be referred to, as establishing that inferior jurisdictions do not possess this wholesome power, contain only mere

(a) This case was decided in last Hilary term.

(b) 1 Dougl. 380.

(c) 1 Stra. 392.

(d) 1 Burr. 568.

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obiter dicta, not called for by the facts of the case, nor made after direct argument upon the point. Unless the Court see clearly that the rule is well established by decided cases, they will not issue the mandamus.

*Chilton*, contra, was about to address the Court, when

Lord DENMAN, C. J. said, we do not consider it necessary to hear you,—nor indeed *proper*,—for that would imply that we thought the question *doubtful*. Where no fraud or irregularity in obtaining the former verdict is shewn or made the ground of the application for a new trial, we think that it does not admit of a doubt but that inferior jurisdictions have no power to grant a new trial.

LITTLEDALE, J., TAUNTON, J. and PATTESON, J., concurred.

Rule absolute.

—◆—

The KING v. The Churchwardens of ST. SAVIOUR'S,  
 SOUTHWARK.

The Court will not grant a mandamus to churchwardens to assemble the parishioners for the purpose of taking a poll upon a motion carried by a show of hands at a vestry meeting *to do an illegal act*,—as to apply a portion of a fund held in trust for charitable purposes, to the erection of a monument to the memory of the donor of the fund.

**B**ALL, in last Hilary term, moved in the bail court, before *Patteson*, J., for a mandamus to compel the churchwardens of St. Saviour's, Southwark, to assemble the parishioners for the purpose of taking a poll upon a motion, put to the vote by show of hands at the vestry meeting of the inhabitants, held on the 21st January then instant. It appeared that three persons had, in the time of *Charles II.*, devised lands in trust to apply the rents and profits for poor persons of the parish. At a vestry meeting held on 7th January last, it was proposed that a monument should be erected in the church to the memory of these three persons, and a vote passed accordingly. On the 21st

of the same month it was moved that the charitable fund should bear the expense, and the motion was carried by show of hands. A poll was demanded, and refused. This motion for a mandamus was to compel the taking of such poll. *R. V. Richards*, in shewing cause, objected that such an application of the funds of the charity, as was contemplated by the motion at the vestry, would be illegal, as being a breach of trust; and therefore the Court would not send a mandamus to compel the taking of a poll upon such a motion.

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*Cur. adv. vult.*

In Easter term, the judgment was delivered in full Court by

PATTESON, J.—We think that the mandamus certainly cannot go, for the reason given by *Mr. Richards*; for although it is true that the effect of sending the mandamus will be to give the inhabitants an *opportunity* of reversing this illegal vote, it *may* be that the vote will be *confirmed*. We cannot command the churchwardens to take a poll for the purpose of trying whether a majority of the inhabitants are, or are not, in favour of the commission of that which would certainly be a breach of trust.

Rule discharged.

GOODWYN v. LORDON.

THE defendant had been charged in two indictments for embezzlement, on the prosecution of the plaintiff; and upon these indictments he was, at the Surrey sessions on the 5th February last, acquitted. On the same day the defendant was discharged by proclamation; and upon leaving the gaol in which he had been confined, on the morning of the

A party who has been detained upon a criminal charge, and tried, acquitted, and discharged, is not privileged from arrest when he has been confined

during his return home from the gaol in which he has



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6th, he was, whilst on his way home, arrested by an officer of the sheriff of Surrey, under process in this action.

Upon an affidavit stating the above facts, and alleging that the arrest was made for vexatious purposes, but not alleging that the criminal charge was preferred for the purpose of enabling the plaintiff to arrest the defendant,

Dunbar, in Easter term, moved that the defendant might be discharged out of the custody of the sheriff of Surrey. The defendant was privileged from arrest during his return home. *Meekins v. Smith* (a). [Lord Denman, C. J. The rule as to privilege from arrest *redeundo* does not appear to me to apply to the case of a party who was detained as a prisoner on a criminal charge. *Littledale*, J. I know that this question has been once or twice before a single judge lately; and I think that it was held that a party was not, under such circumstances, entitled to the privilege.] The defendant had been twice declared to be no criminal. In *Wells v. Gurney* (b), where a party had been arrested on a criminal charge on a Sunday, for the purpose of effecting an arrest on civil process on the Monday, and such arrest was accordingly made on the Monday, the Court ordered him to be discharged. [Lord Denman, C. J. Where a party is arrested on a criminal charge, in pursuance of a *scheme* for arresting him with more facility upon a civil charge, the Court will order him to be discharged. But the acquittal here upon two indictments preferred by the same party at whose suit he is, upon his acquittal and discharge, arrested, does not of itself shew that the criminal charge was a mere contrivance, on the part of the plaintiff, to enable him to arrest the defendant. It does not appear that it was a contrivance for that purpose. Therefore the question comes to this,—whether a party returning home, after being before a court of justice by compulsion, upon a criminal charge, is privi-

(a) 1 H. Bla. 636.

(b) 8 Barn. & Cressw. 760.

leged from arrest. The case that comes nearest to this is that of *Rex v. Blake* (a), in which it was held—that a party taken under an irregular writ, is privileged from arrest in returning from the chambers of the judge who has discharged him: So, although his attendance before the judge be voluntary; as where he is brought up under habeas corpus obtained by himself.—This is a very important question, and we will take time to consider it.]

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GOODWYN
v.
LORDON.

Cur. adv. vult.

Lord DENMAN, C. J., on the following day, delivered judgment.—We have not been able to discover any precedent for discharging a party from the custody of the sheriff, on the ground that at the time of his arrest he was returning from a court of justice where he had been detained upon a criminal charge. There is an anonymous case reported in 1 *Dowling's Practice Cases*, 157, in which a similar application was made, in the bail court, to my brother *Parke*, who, after consulting the Court, held that the party was not entitled to the privilege from arrest. We therefore think that the rule cannot be granted.

Rule refused.

a) *Ante*, vol. ii. 312.

M'CORMACK v. MELTON.

THIS action was tried before the under-sheriff of Middlesex, and the plaintiff recovered 33*l.* 10*s.* for damages and costs. In a *ca. sa.*, which was afterwards issued against the defendant, the sum recovered was erroneously stated to be 34*l.* 10*s.* *Taunton*, J., made an order for amending the process, by the insertion of the correct sum, instead of 34*l.* 10*s.*

Where the sum mentioned in a *ca. sa.* varies from that in the judgment, but the party has sustained no damage from the error, the Court will amend the writ.

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M'CORMACK
 v.
MELTON.

Miller, in last Easter term, moved for a rule nisi to rescind the order of *Taunton, J.*, and to discharge the defendant out of custody. This amendment was not of a matter of form merely, but of substance, and ought not, therefore, to have been made by the learned judge. [*Patteson, J.* I see that Mr. *Tidd* states that "the ca. sa. may be amended by the judgment,—in the names of the parties, if mistaken, or in the amount of the sum recovered." And he cites several cases, and amongst others, *Laroche v. Wasbrough(a)*, where, after error brought, the Court permitted a ca. sa. to be amended by altering the sum directed to be levied to the original amount recovered. [*Littledale, J.* There is also the case of *Mouys v. Leake(b)*, in which the Court amended a writ of execution for 1400*l.*, which had issued upon a judgment for 700*l.* only, it appearing that the sum of 1400*l.* had been inserted in the writ by mistake, and that in fact only 700*l.* had been levied.]

LORD DENMAN, C. J.—The rule is correctly laid down by Lord *Kenyon* in *Laroche v. Wasbrough*, where he says, "The justice of the case requires that we should permit the plaintiff to amend; if the defendant had indeed suffered by the excess in the execution, that might have varied the case, but here he has not sustained any damage by it." The defendant has, in the present case, sustained no damage; and any inconvenience that he may have suffered, he has brought upon himself by his default in payment of what he owed.

LITTLEDALE, J., PATTESON, J., and WILLIAMS, J. concurred.

Rule refused.

(a) 2 T. R. 737. And see *Newnham v. Law*, 5 T. R. 577.

(b) 8 T. R. 416 (a)

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FREEMAN and others, Executors, &c. v. MOYES.

THIS action was commenced in Easter, 1832, and the cause being set down for trial, and notice of trial given for the London sittings in Michaelmas term, 1832, was made a remanet, and was at last tried in Michaelmas, 1833, when the defendant had a verdict. On 1st June, 1833, the 3 & 4 Will. 4, c. 42, had come into operation. Sec. 32 of that statute enacts, that in every action *brought* by any executor or administrator in right of the testator or intestate, such executor, &c. shall (unless the Court in which such action is brought, or a judge of any of the superior Courts, shall otherwise order,) be liable to pay costs to the defendant, in every case in which he would be liable if he were suing in his own right, upon a cause of action accruing to himself. The defendant took out a summons for taxation of his costs under this statute, and the Master taxed the costs, but recommended that an application should be made to this Court, for the purpose of ascertaining whether the statute applied to this case, or was only applicable to actions by executors, commenced after the passing of the act. A rule nisi for setting aside the taxation was obtained in Hilary term, 1834, and in the same term cause was shown by

The 32d section of 3 & 4 Will. 4, c. 42, as to payment of costs by executors and administrators, in actions brought by them, was held by the Court, dissentiente Little-dale, J., to apply to actions *tried* after the passing of the act, whether commenced before or not; although the cause had been made a remanet before the passing of the act.

Sir *James Scarlett*, who contended that the words "in every action *brought*," were retrospective, as well as prospective,—and that if it had been intended to confine the enactment to actions *to be* commenced after the passing of the act, the legislature would, as in all other cases, have used *prospective* words. He also contended that the present enactment was, in this respect, similar to the clause in Lord *Tenterden's* act, (9 Geo. 4, c. 14, s. 1,) which had been held to apply to parol acknowledgments and promises made *previously* to the passing of the act.

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Platt, contra. The enactment is not retrospective. The cases upon Lord *Tenterden's* act are not applicable. That statute merely introduced a new rule of evidence, whereas the present enactment takes from executors and administrators a right which they previously possessed.

As it was by reason of the cause having been made a *remanet*, that it was not tried before the passing of the act, this is a case in which the Court, supposing the act to be retrospective in its operation, would exercise the discretionary power, given to them by the clause, of *otherwise ordering*.

Cur. adv. vult.

LORD DENMAN, C. J., in Easter term said, that upon inquiry the Court had found that the Courts of Common Pleas and Exchequer had both held that the clause was retrospective; and that therefore they would discharge the rule.

LITLEDALE, J., said that he was not inclined to concur in opinion with the rest of the Court. He thought that it could not have been intended that a party who had commenced an action upon the faith that he should, according to the law then in force, be free from liability to pay costs, should be made liable to such payment by an enactment *subsequently* made.

Rule discharged.



IN THE EXCHEQUER CHAMBER—FROM THE KING'S
BENCH.

1834.

BAYLEY v. DREVER and others.

DEBT upon 2 & 3 *Edw.* 6, c. 13, for not setting out tithes. The declaration stated that the plaintiffs (below) were proprietors of the tithes of corn grain and hay, of certain lands in the parish of Prestbury, in the county of Chester, and that the defendant (below) was occupier of the same lands. It then stated the subtraction of the tithes by the defendant, and claimed the treble value. Plea: nil debet. From the particulars of the plaintiff's demand, it appeared that the action was brought to recover the value, single or treble, of the tithe of eight acres of hay for six years, commencing with 1825, and amounting to 15*l.* in the whole.

The cause was tried at the summer assizes, 1831, for the county of Chester, before *Bolland*, B. In support of the plaintiff's case, there were given in evidence, first, certain letters-patent of Queen *Elizabeth*, dated 19th of November, 1579, granting to several persons, one of whom was *Thomas Leigh*, among various other things, "the tithes, portions, and oblations issuing &c., out of and in the mill, fields, parish or hamlets of Prestbury, and also all the rectory and church of Prestbury, (which rectory and premises to the monastery of St. Werburg, had theretofore belonged and pertained :) and all manors, glebes, tithes, obventions, &c., situate &c., in the mill, fields, parish and hamlets of Prestbury, or elsewhere, in the county of Chester, belonging to the said rectory, or reputed as parcel thereof."

Secondly, a deed of partition, dated 1st of October, 1586, whereby the other grantees released to *Thomas Leigh*, the whole of that which had been so granted to them jointly.

tion by parties not shewn to be in privity of estate with the plaintiff,—and to produce leases of the tithes granted by those persons to former occupiers of the defendant's land.

The decisions against raising a presumption of a release or a grant, as against a lay improprator of tithes, from continual non-payment of tithes, are so strong that the Court of Error in the Exchequer Chamber refused to over-rule them, though dissatisfied with the ground upon which the decisions rest, and referred the parties to their remedy by writ of error in parliament.

Perception of the tithe of corn, is evidence of title to other rectorial tithes,—as hay.

In debt for not setting out tithes, it is competent to the plaintiff to give evidence of the perception of the tithes of the lands in ques-

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ry found a verdict for the plaintiff for 45*l.*, being treble
the amount specified in the particulars of demand. Judg-
ment was accordingly entered up in the King's Bench,
and the defendant sued out a writ of error in the Ex-
chequer Chamber, and assigned as errors the several rulings
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This writ of error was argued in last Easter vacation
before *Tindal*, C. J., Lord *Lyndhurst*, C. B., *Park*, J.,
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J. H. Lloyd for the original defendants. The first of
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enjoyment, a legal origin and title may be and ought to be

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Thirdly, certain leases and counterparts of leases of the tithes (comprehending *nominatim* every species of tithe and obvention) arising within the township of Macclesfield forest, in the parish of Prestbury, (within which township the lands in question were situated,) purporting to have been granted by different members of the family of *Leigh*, for terms of years long expired; the earliest of which bore date 12th June, 1710, and the latest 16th October, 1798; upon certain of which leases the receipt of rent was duly proved.

Fourthly, similar leases of the tithes arising in other townships of the same parish, from 11th November, 1686, to 16th October, 1798, purporting to have been granted in like manner by the *Leighs*; as to some of which also payment of the rent reserved was duly proved.

Witnesses were called by the plaintiffs, who proved that the tithe of corn had been received by members of the family of *Leigh* from the defendant, and from others, down to the time of the death of Mr. *Richard Leigh*, which occurred in the year 1822, and that since that year the tithe of corn had been received for or on account of the plaintiffs. Some evidence was also given for the purpose of shewing a pernancy by the family of *Leigh* of the tithe of *hay*; but this evidence was of an unsatisfactory nature, and the course which is taken in the argument in this Court, renders it unnecessary to state it more particularly. It was proved, however, that since the year 1822 tithe of corn *alone* had been taken. It was objected that there was no evidence of any right or title in the plaintiffs below to the *tithe of hay*; but that, on the contrary, an adverse title had been proved by the documents given in evidence by the plaintiffs in support of their action. This objection was over-ruled by the learned baron. It was further objected by the defendant's counsel, that the leases and counterparts given in evidence, were irrelevant, and ought to be withdrawn from the consideration of the jury, inasmuch as the plaintiffs had not been shewn to derive any title from, or to be in

any way connected with, the persons by whom those leases were respectively granted. This objection was also overruled.

The learned baron then summed up the evidence on both sides, and directed the jury, "that it was clear that mere non-payment of tithe was no answer to a claim of tithe by even a *lay* impropiator; and that the jury could not presume a grant from mere non-payment of tithes; that the perception of the tithe of *corn* by the plaintiffs was evidence of a title in the plaintiffs to the tithe of *hay*; that the tithe of hay followed that of corn, unless shewn to be severed by some grant or conveyance; and, that the leases and counterparts of leases, as well of tithes within the township of Macclesfield forest, as of tithes within other townships in the same parish, were good and admissible evidence for the purpose of rebutting the presumption of a grant which it was contended on the part of the defendant arose from the non-payment of the tithe of hay." To all which opinions and directions the counsel for the defendant below excepted, and a bill of exceptions was handed to the learned baron and sealed. The jury found a verdict for the plaintiff for 45*l.*, being treble the amount specified in the particulars of demand. Judgment was accordingly entered up in the King's Bench, and the defendant sued out a writ of error in the Exchequer Chamber, and assigned as errors the several rulings of the learned baron above stated.

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presumed. And although there are authorities which seem to bear out the proposition that no distinction exists in this respect between a lay and a spiritual rector, and that mere non-payment of tithes, however remotely carried back, furnishes no answer to the claim of either; yet these authorities, when examined, will be found to rest on no sure foundation; and this Court, as a Court of appellate jurisdiction, will, if they see that the grounds upon which the cases have been decided are fallacious, not consider themselves bound by the decisions. The authorities proceed on the assumption, that the claim founded on non-payment, as evidencing a lost grant, is in substance and effect a claim of a prescriptive *exemption* from tithe altogether, a prescription in *non decimando*, which, it is admitted, cannot prevail against either a spiritual rector or a lay impropriator. But the two cases are essentially distinct; the one being a claim which is inconsistent with the nature and origin of the property, the other being in no respect inconsistent with either, and being at the same time in strict accordance with the rules of law, as applied to every other description of property having similar qualities. Before the dissolution of monasteries, the property of the church could not be granted away from the church, and no layman could plead an entire exemption from the payment of tithe. There could therefore be no prescriptive title in a layman, whether arising from grant or from release. But when, after the dissolution, a portion of the church property came into the hands of laymen, the nature and character of that property were altered; it acquired the qualities of lay property generally, and became susceptible of every modification of which lay property admitted. There is nothing, therefore, unreasonable in the supposition, that the whole or a portion of the tithes of a rectory may have been granted away either in perpetuity or for a term; or, what is substantially the same proposition, that an individual proprietor of lands subject to tithes, or the whole of such proprietors within a given district, should have obtained, for an adequate consideration, a

release from the payment of the whole or some particular species of tithe. In the contrary doctrine, on the other hand, there is this anomaly, that time which gives *security to all other property, impairs the security of this*, by destroying the evidence of title in which it is founded, without affording any equivalent protection by means of presumption from the length of enjoyment. It is submitted, therefore, that a doctrine so entirely at variance with the principles of law, and so destitute of any foundation of reason and equity, cannot be sustained; more especially as it has many times been questioned and condemned by high and distinguished legal authorities.

The cases upon the subject are collected in *Eagle* on Tithes, cap. 3, sec. 6. [Lord *Lyndhurst*, C. B. That author states the result of the authorities to be “that mere non-payment is undoubtedly, not even amongst laymen, any answer to the demand of tithes;” and upon examining the cases, it will be found that this is the correct result.] The author, in the beginning of the section, clearly shews that he considered the law of presumptions of titles to tithes against the parochial or common law right of rectors, and, in particular, of impropriate rectors, as in a most unsatisfactory, uncertain, and unsettled state; and the language of Lord *Eldon*, in *Williams v. Bacon* (a), which he there cites, shews that such also was his lordship’s opinion. In *Medley v. Talmey* (b), (A. D. 1759,) as given by Mr. *Eagle*, the Court declared, that though the tenant could not *prescribe in non decimando*, yet that against a lay impropriator they would presume tithes *granted* to the terre-tenant, no tithes having ever been paid, but the land, as sworn, looked upon as tithe-free. In that case there had only been 43 years possession by the defendant. In all the cases in which the Courts have held that non-payment afforded no presumption of a grant or release, they have proceeded upon the supposition that the ques-

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(a) *Eagle* on Tithes, 88; 3 *Eagl.*
& *Young*, 1178.

(b) *Dodd’s MS.* 168; 1 *Eagl.*
& *Y.* 630; *Gwill. Tithes*, 559.

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tion was one of a prescription *in non decimando*, and not of a *lost grant* or release. It is properly a question for the jury, as in ordinary cases, whether *in fact* a grant or release has been executed. [Lord *Lyndhurst*, C. B. That which is thrown out by Lord *Redesdale* in *Norbury v. Meade*(a), is the strongest authority for you. It may be that there is enough to satisfy the *House of Lords* that they ought to reverse the decisions; but I do not think that when, as is the fact, the current of the *decisions* is all in one direction, we can take upon ourselves to over-rule those decisions,—notwithstanding that eminent judges have doubted the soundness of the principle upon which the decisions have proceeded. *Tindal*, C. J. It is necessary, in order to raise a *presumption* of a grant or release, that there should be some *collateral* fact besides the non-payment of rent.] Mr. Baron *Clark*, in *Fanshaw v. More*(b), expressed as strong a dissent from the doctrine in question as did Lord *Redesdale* in *Norbury v. Meade*. His lordship, after other strong observations, says, “It seems very extraordinary that a layman may prescribe upon a presumption of a grant being lost for a portion of tithes in the soil of another, even against the rector of the parish, and yet cannot prescribe for the tithes of his own lands in the same way. [Lord *Lyndhurst*, C. B. That anomaly has been mentioned in all the cases, and yet the decisions have all been one way. *Parke*, J. Mr. Baron *Clark* ends the judgment to which you have alluded, by acknowledging and submitting to the force of the authorities.]

II. The leases which were given in evidence were not properly admissible in support of the title of the plaintiffs below, for it does not appear that they are in any manner connected, as regards title, with the *Leigh* family, by whom these leases purport to have been made. It was proved that the last of that family died in 1822, and that the tithes which had been received since that time had been received by certain persons, on account of the plaintiffs;

(a) 3 Bligh's P. C. 211.

(b) 2 Eagle & Y. 92; Gw. 780.

but it was not shewn *in what right* they received them. [Lord *Lyndhurst*, C. B. One step in the case was to shew that the *Leighs* were entitled; and for that purpose those documents were admissible.]

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III. There was no evidence of any right or title in the plaintiffs below to the tithe of *hay*; but, on the contrary, a title adverse to the plaintiffs has been proved and established by the documents given in evidence; whereas the documents shew a title in the *Leighs* to *all* tithes, it appears that there was no perception of tithes for the hay by the *plaintiffs*, nor any claim for such tithes. Perception of the tithe of *corn* is not even *primâ facie* evidence of a title to tithe of *hay*. It is consistent with the evidence, and even *presumable*, that *Richard Leigh* may have leased the tithes of *corn* to the plaintiffs, and that they have no title to any thing beyond. [*Tindal*, C. J. It is not necessary to prove the actual taking of *all* kinds of tithes. Lord *Lyndhurst*, C. B. The *pernancy* of the tithes of corn is *primâ facie* evidence of a title to the *rectory*, and I do not think that there was any evidence *inconsistent* with that *primâ facie* case.]

Temple, *contra*, was stopped by

TINDAL, C. J., who, after inquiring of the other judges and barons whether they had any doubt upon the principal question, said—We cannot,—it is clear,—say that from the mere non-pernancy of tithes, a grant or release can be presumed without over-ruling *all* the decisions which have passed upon the subject; and this we are not prepared to do.

LORD LYNDHURST, C. B.—I think that *we cannot* make the presumption which the defendants require. I confess that I have been much struck with the arguments which have been addressed to us to-day, and perhaps they may be urged with more effect in another place.

Judgment affirmed.

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WRIGHT v. The KING (in error).

The Court of Exchequer Chamber has jurisdiction under 11 G. 4, & 1 W. 4, c. 70, s. 8, to correct errors in judgments in the King's Bench in criminal cases.

Words of reference, as "there" and "said," in an indictment, will not be referred to the last antecedent, where the sense requires that they should be referred to some prior antecedent.

Thus, where in an indictment for a nuisance it was alleged that the defendant, at the township of W., encroached upon a highway *there*, (i. e. at the township of W.) leading from a highway in the said township, leading from the village of W. towards C., to another highway in the said township, from the village of W. to the township of X., by a certain wall *there* extending into the *said* highway, and erected by the defendant, it was held that the words "there" and "said" must be taken as referring to the township of W. and the highway there, and not to the township of X., or to the highway leading from the village of W. to the township of X.

INDICTMENT for a nuisance, found at the Lancashire sessions, in 1831, stating that *Robert Wright*, of the township of Wavertree, in the county of Lancaster, on &c., with force and arms &c., at the township aforesaid, in the county aforesaid, in and upon a common *highway there* leading from a certain public road or common highway in the said township and county, leading from the vicarage of Wavertree towards the parish church of Childwall, towards and unto a certain other public road or common highway in the said township and county, leading from the said village of Wavertree, towards and unto the township of Little Wootton, in the said county, *by a certain wall there*, containing in length 330 yards, *and extending into the said highway* at the north end thereof seven yards, and at the south end thereof five yards, by him the said *Robert Wright* erected and built, hath unlawfully and unjustly encroached, and yet doth encroach, and the said wall so as aforesaid erected and built by him the said *Robert Wright*, from &c. unto the day of exhibiting this information at the township of Wavertree aforesaid, in the county aforesaid, with force and arms unlawfully hath continued and doth continue. By reason whereof the common highway aforesaid hath become and is greatly straitened, so that the liege subjects of our lord the king, upon and through the same common highway aforesaid, with their horses carts and carriages cannot go, pass, ride, and labour, as they ought and were wont to do, to the great and common nuisance of all the liege subjects of our said lord the king in and through the same common highway, going, returning, passing, riding and labouring, and against the peace &c. This indictment was removed

into the Court of King's Bench by certiorari, and was tried at the assizes for the county palatine of Lancaster, in the summer of 1832, when the defendant was found guilty. Judgment was, in the following term, entered up in the Court of King's Bench, and the defendant brought error in the Court of Exchequer Chamber.

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The case having been entered for argument on a day in last Hilary term, *Crompton* was about to argue for the plaintiff in error, when doubts were expressed by *Tindal*, C. J., whether the Court of Exchequer Chamber had, under the act of 11 *Geo.* 4 and 1 *Will.* 4, c. 70 (a), jurisdiction over matters of indictment. His lordship suggested as particular difficulties in the way of a construction of the act, favourable to their jurisdiction in criminal cases,—that if error might be brought upon judgments in the King's Bench in criminal cases, a man convicted of murder, for instance, at the bar of the King's Bench, would have it in his power to delay the execution of his sentence :—and that the judges of the Common Pleas and the barons of the Exchequer not being properly criminal judges, it could hardly have been intended that they should sit as a court of error upon the judgments of that Court, which is considered the highest tribunal of criminal justice in England. *Crompton* reminded the Court that they had exercised

(a) Which in sect. 8 enacts, "That writs of error upon any judgment given by any of the said Courts, shall hereafter be made returnable only before the judges, or judges and barons (as the case may be) of the other two Courts in the Exchequer Chamber, any law or statute to the contrary notwithstanding;—that a transcript of the record only shall be annexed to the return of the writ;—that the court of error, after errors are duly assigned and issue in error joined, shall at such time as the judges

shall appoint, either in term or vacation, review the proceedings and give judgment, as they shall be advised thereon;—that such proceedings and judgment, as altered or affirmed, shall be entered on the original record;—and that such further proceeding as may be necessary thereon, shall be awarded by the Court in which the original record remains,—from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament."

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jurisdiction as a court of error in *Trafford v. Regem* (a), which, like this case, was an indictment for a nuisance; but the Court answered that in that case the question as to the jurisdiction was not discussed or thought of. The Court then directed that the hearing of the case should be postponed, in order that the question as to the jurisdiction of the Court might be fully discussed.

In Easter term, the case was again called on and argued (b) by

First point:
 Jurisdiction.

Crompton, for the plaintiff in error. In answer to the first suggestion thrown out on a former occasion by Lord Chief Justice *Tindal*, it may be remarked, that in cases of treason and felony the subject cannot have a writ of error, unless the *fiat of the attorney-general* be granted, and that the objection would apply with still greater force, as an objection of inconvenience, to the jurisdiction which the House of Lords possessed before the passing of this act.

To the second suggestion, the answer that is offered is, that the judges of the Common Pleas and barons of the Exchequer *do* on the circuit and at the Old Bailey sit as criminal judges under commissions of oyer and terminer, and that the barons of the Exchequer, as such, have jurisdiction over an extensive class of crown cases. It may also be answered, that a similar objection might be made, with precisely the same force, to the jurisdiction of B. R. over judgments of C. B. in real actions, and that of the Lord Chancellor and the Chief Justices, under 31 *Edw. 3*, stat. 1, c. 12 (c), over revenue matters, until the late statute.

The general question, whether the king is bound by the clause in the act of 11 *Geo. 4* and 1 *Will. 4*, c. 70, giving its present jurisdiction to this Court, he not being specially

(a) 2 *Crompt. & Jerv.* 265.

(b) Before *Tindal*, C. J., Lord *Lyndhurst*, C. B., *Park*, J., *Gaselee*, J., *Vaughan*, B., *Bolland*, B., *Alderson*, J. and *Williams*, B.

(c) The two chief justices sat as assessors only to the chancellor, without voices; see *Mann. Exch. Prac.* 1st ed. 492; P. 8 *Hen. 7*, fo. 13 a, pl. 7; 4 *Inst.* 105; *Carth.* 588; *post*, 901.

named in that clause, though named in other parts of the act, will be best discussed—by, first, bringing before the Court the authorities which bear upon the point; secondly, by examining whether the enactment is in prejudice of the rights of the crown; thirdly, by comparing the enactment in the late statute with former statutes for the advancement of justice; and lastly, by considering the general object of the present enactment.

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I. The authorities shew that the general rule, that the king shall not be bound by general words in an act of parliament in which he is not named, applies only when the *property* or some peculiar *privilege* of the crown is directly affected; and not even then if the act be for the general good,—as for the advancement of justice, learning, or piety. This is expressly laid down in some of the authorities, and explains others that might at first seem unfavourable to the argument that the king is bound. *Com. Dig. Parliament*, (R. 8.); *Bac. Abr. Prerogative*, (E. 5.); *Viner's Abr. Statute*, (E. 10.); *Willion v. Berkeley*(a); *the case of Magdalen College*(b); *Regina v. Tuchin*(c), where the king was held not to be bound by the statute of amendment, 1 stat. 14 *Edw. 3*, c. 6, *because* the word "*party*" (which always excludes the crown, and which is not found in the act now under consideration) was there used;—*the case of Ecclesiastical Persons*(d);—*Standen v. The University of Oxford*(e);—*Rex v. The Archbishop of Armagh*(f);—the decisions that the king is not bound by provisions affecting the property or peculiar prerogative of the crown in the statutes of limitations,—the statutes relating to the distribution of the property of bankrupts and insolvents,—and the statute of frauds,—are all explained by the principle which has been adverted to. That the clause of 11 *Geo. 4* and 1 *Will. 4*, c. 70, the effect of the provisions of which is now under

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| (a) Plowden, 227, 236. | 6 Mod. 268, 1 Salk. 51. |
| (b) 11 Co. Rep. 72, 73; S. C. | (d) 5 Co. Rep. 15. |
| 1 Rolle's Rep. 165. | (e) Sir W. Jones's Rep. 17. |
| (c) 2 Lord Raym. 1066; S. C. | (f) 1 Strange, 516. |

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consideration, does *not* affect the property or the peculiar privileges of the crown, and that it is an act for the *advancement of justice*, will presently be shewn.

2dly. This act does not prejudice the rights of the crown. So far from being an act restraining the prerogative, or limiting its property, it is a remedial act, giving more speedy and less expensive redress to both the crown and the subject. (The Court said this second point was too plain to require argument.)

3dly. Upon an examination of those acts, *in simili materiâ*, by which the king has been held not to be bound, it will be found that the reason is, that they have contained *express exceptions*. In the act of 27 *Eliz.* c. 8, intituled, "An Act for the redress of erroneous judgments in the Court commonly called the King's Bench," by which the Court of Exchequer Chamber, as a court of error upon judgments of B. R. was first constituted, there is an express exception of "such only where the queen's majesty shall be a party." In 4 *Anne*, c. 16, "for the amendment of the law, and the better advancement of justice," (which act therefore, according to the argument which has been urged, ought to bind the crown, and to extend to criminal as well as civil cases,) there is, in section 7, an express proviso—"That nothing in this act before contained shall extend to any writ, declaration, or suit of appeal of felony or murder, or to any *indictment* or presentment of treason, felony or murder, or to other matters, or to any process upon any of them, or to any writ, bill, action, or information upon any penal statute." Thus it was thought necessary, by the great lawyers by whom those statutes were framed, to make express exceptions, in one act, of cases in which the crown was a party, and in the other, of all kinds of criminal proceedings,—lest these acts *for the advancement of justice* should extend to the crown and to criminal cases. The framers of the present act must also be taken to have had before them these former statutes, and the *omission, in this act, of any exception*, may be considered as amounting to a

declaration that the legislature intended that it should be universal in its operation.

4thly. The intention of the legislature, as apparent from the act, was to create *one uniform court of error*, and it is evident that this object could not be obtained if the crown were not bound by its provisions. Upon going through the act, it appears perfectly clear that it was intended that the King *should* be bound by its provisions,—that revenue cases should not be again carried before the Lord Chancellor and the two Chief Justices, and that cases in the Common Pleas, in which the king is a party, as in actions of *quare impedit*, should not again be carried to the King's Bench by writ of error. Such a preservation of these old jurisdictions would be entirely inconsistent with many of the provisions of the act, and would be directly at variance with the language of the 8th section, which enacts “that writs of error upon *any* judgment given by *any* of the said Courts, shall hereafter be made returnable only before the judges, or judges and barons, as the case may be, of the other two Courts in the Exchequer Chamber, any *law* or statute to the contrary notwithstanding.” In conclusion, it may be remarked, that the *king* is repeatedly *named* in this act, and that some parts of the statute apply expressly to *criminal* matters.

Assuming that this Court has jurisdiction to correct errors in judgments of B. R. in criminal matters, the question upon this particular record must now be considered. The indictment is bad for not stating with *certainty* the *place* in which the nuisance was committed. It states that the defendant, *at* the township of *Wavertree*, encroached upon a common highway *there*, leading from a common highway in the same township, from the village of Wavertree to the parish church of Childwall, towards and unto another common highway, leading from the said village of Wavertree to the township of *Little Woolton*, by a certain wall *there*, extending into the *said highway*, by him the defendant erected and built. The word “*there*” following the words

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"by a certain wall," necessarily refers to "the township of Little Woolton," which is the last antecedent, and consequently the indictment is insensible. The "*said highway*" into which the wall is alleged to extend, must mean the highway leading from the village of Wavertree to the township of Little Woolton, and therefore also the indictment is insensible; *Longe v. Atkins* (a), *Manchester v. Daper* (b), *Ogle's case* (c), *Walford v. Anthony* (d). [Lord Lyndhurst, C. B. If the whole description of the road be considered as in a parenthesis, the statement of place is intelligible.] The Court would not be warranted in supplying a parenthesis, for the purpose of supporting an indictment.

The COURT intimated that it was not their intention to hear the counsel on the side of the crown argue that the Court had not jurisdiction over criminal matters.

Starkie, for the crown, cited from *Finch's Discourse of Law*, book i. cap. 3, the following passage:—"Words of construction must be referred to the next antecedent, *where the matter itself doth not hinder it.*" He also referred to *Guier's case* (e), and *Rex v. Morris* (f), and argued that as the *only* way of giving an intelligible meaning to the words "there" and "said" was by referring them to the first antecedent, the *matter* might be said to *hinder* the referring them to the last antecedent.

He was stopped by the Court, who however deferred their judgment, in order that they might more fully consider the question of jurisdiction.

Cur. adv. vult.

(a) 2 Roll. Abr. *Parolls* (E),
 pl. 10. And see Com. Dig. *Parols*
 (A. 14).
 (b) *Ibid.*
 (c) 2 Hale's P. C. 180.

(d) 8 Bingh. 75; 1 Moore &
 Scott, 126.
 (e) *Dyer*, 46 b.
 (f) 1 Leach, C. C. 3d ed. 127.

On a day subsequent, TINDAL, C. J., delivered the judgment of the Court.

Some doubt having occurred to the Court, whether its *jurisdiction* extended to the case of criminal proceedings brought by writ of error from the Court of King's Bench, we requested that this point might be discussed before we heard the argument on the case itself.

Such discussion has accordingly taken place; and if we had still entertained any doubt upon the subject, we should have directed an argument, by the law officers of the crown, before all the judges.

But we are perfectly well satisfied that, upon the proper construction of the statute by which this Court is constituted, we *have* jurisdiction over criminal as well as civil cases, when brought before us on writ of error.

The act itself is entitled "An Act for the more effectual administration of Justice in England and Wales;" and the preamble declares the intention to be, "to make more effectual provision for the administration of justice in England and Wales." And again, the 8th section, (by which this Court is constituted,) is expressed in terms the most general and simple,—“That writs of error upon *any* judgment, given by *any* of the said courts, shall hereafter be made returnable only before the judges, (or judges and barons, as the case may be,) of the other two Courts, in the Exchequer Chamber.”

In the case therefore of an act of parliament, passed expressly *for the further advancement of justice*, and in its particular enactment using terms so *comprehensive* as to include *all* cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of *criminal* cases, upon the ground that the *king*, as the public prosecutor, is not expressly mentioned in this act.

By such a construction of the act, its object and intent can best be attained; and it may be observed that no *difficulty* can follow from this circumstance as to the *carrying*

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into effect the judgment pronounced by this Court in *criminal* cases, the statute having directed that a *transcript* only of the record shall be annexed to the return of the writ of error, and that the judgment, when altered or affirmed, shall be entered *on the original record*, and all further proceedings shall be awarded by the Court in which the original record remains.

Second point. With respect to the error assigned in this particular case, we are all of opinion that it is not available, and that the judgment of the court below ought to be affirmed.

The indictment alleges that the defendant, at the township of Wavertree, in the county of Lancaster, in and upon a common highway *there*, leading from a certain public road (of which the termini are described) to a certain other public road (of which the termini are also described, and which are from Wavertree to the township of Little Wootton,) by a certain wall *there* extending into the said highway, unlawfully hath excavated; and it is contended in argument, by the plaintiff in error, that the latter word *there* must of necessity be referred to the *last* antecedent, that is, to Little Wootton.

The answer appears to us to be, that the only way of reading the indictment, so as to make sense of it, is by considering the township of Little Wootton to be stated in the indictment merely as the terminus of one of the two cross highways; and in that case there can be no ambiguity in the indictment, as the word *there* cannot refer to that highway, but must of necessity refer to the highway in question, namely, that at Wavertree. And we think that if there is no *necessary* ambiguity in the construction of the indictment, we are bound not to create one by reading the indictment in the only way which will make it unintelligible. In *Ogle's* case (a) the sense is ambiguous: the assault may as well have been made at N. in the county *aforesaid*, as at F. in the county *aforesaid*, of which place the defendant is described by his addition. It is just as sensible whe-

(a) 2 Hal. P. C. 180.

ther the reference be made to the one or to the other. There was therefore an *uncertainty* in that case, which was held to be fatal. But in this case the nuisance by erecting a wall, which is local, must be at Wavertree, where the road has already been described to be; it could not possibly be at Little Wootton. There is therefore no uncertainty; and the word *there* must consequently be held to refer to the only antecedent which can make *sense* of the indictment, that is, to Wavertree. We think the authority cited from *Finch's Law* is decisive.

Upon the whole we are of opinion that the judgment must be affirmed.

Judgment affirmed (*a*).

(*a*) Allusion was made in argument (*ante*, 894,) to the course of proceeding in the first *statutory* court of error. This court, being instituted for correcting errors in the Court of Exchequer, was directed to meet in some chamber of counsel near the Exchequer; in imitation of which, courts of error subsequently created have been directed to sit there also. This original Court of Exchequer Chamber was the fruit of a long struggle between the Commons and the Barons of the Exchequer.

"In 2 *Edw.* 3, the barons of the Exchequer refused to certify the record of a judgment on a writ of error, which had issued out of the court of Chancery, returnable in the King's Bench, on the ground that the custom had been to reverse such judgments by special commission, directed to the treasurer and certain of the judges, and not otherwise; wherefore such commission was granted. *But the record was very humble and submissive of their return upon the writ*

of error, in which they refused to certify the record in the King's Bench." Cited by *Egerton*, Attorney-General, *F. Moore*, 566.

In 21 *Edw.* 3, we find the following entry on the Parliament Roll: "The Commons pray that the judgments given in the Exchequer be redressed and reversed, if error there be, in the King's Bench, as well as judgments given in the Common Pleas, and not before the same persons who gave the judgments, for it is not likely that a man should have a good conceit against his own opinion." ANSWER:—"It pleases our lord the King that whensoever a man complains of such error done in the Exchequer, the chancellor and treasurer for the time being, and two justices, be assigned by commission to cause to come before them, in the Exchequer, the record and process of the plea wherein the error is supposed, and to correct them according to that which belongeth." 2 Rot. Parl. 168, No. 26. In the following year the Commons re-

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newed their petition, nearly in the same language. The only reply which they obtained from the King was, "This article was answered at the last parliament." Ibid. 208, No. 21.

Thus matters continued until the passing of 31 *Edw.* 3, stat. 1, c. 12, the provisions of which do not appear to have given perfect satisfaction, as we find in the beginning of the next reign (1 *Ric.* 2) the following petition of the Commons:—"Also, that error done in the Exchequer may be redressed in the King's Bench or in Parliament." ANSWER:—"There is a statute in this case which the King

wills to be observed." 3 Rot. Parl. 24, No. 105.

For instances of special commissions issued under the great seal, to examine errors in the Exchequer, and *make report* to Parliament, where such remedy was to be given as the case might be considered to require, *vide John de Locestre's case*, H. 11 *Edw.* 3, in libro rubro de scaccario 322; *Countess of Kent v. Abbot of Ramsey*, P. 14 *Edw.* 3, cited 4 Inst. 106; *Abbot of Reading's case*, 25 *Edw.* 3; 2 Burton, *Exch. Pract.* 218, citing Ball, 35; *Sir William de la Pole's case*, 2 Rot. Parl. 154, 18 *Edw.* 3, No. 403, and Rot. Parl. 1 *Ric.* 2.

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END OF TRINITY TERM.

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1. A Court has no power to order the bill of an attorney to be taxed un-

less it appear that some part of the business was done in the Court in which the application for the order is made. *Ex parte King*. 437

2. A defendant's attorney having delivered to his client his bill of costs from which more than one-sixth is taxed off, cannot afterwards alter that proportion, by adding on both sides of the account a sum received by him from his client, and paid into Court. *Hays v. Trotter*. 174
3. The Court refused to require an attorney to pay the costs of taxation, where the deduction beyond one-sixth was occasioned by the entire disallowance of one of the bills delivered, on the ground of non-liability. *Mills v. Revett*. 767
4. Where less than one-sixth is upon taxation struck off an attorney's bill, the Court will, as a matter of course, order the client to pay the costs of taxation. *Ibid*.

II. His Lien.

See ECCLESIASTICAL COURT.

III. Striking off the Rolls.

5. The Court will not entertain an application to strike an attorney off the rolls, except where it is made by counsel. *In re ——— Gent., one &c.* 556
6. In affidavits in support of a rule to strike an attorney off the rolls, it is not sufficient for the deponents to state facts from which such misconduct may be inferred, without directly asserting their belief that the party charged has been actually guilty of such misconduct. *In the matter of King, Gent. one &c.* 716

AUCTION.

See VENDOR AND PURCHASER, 1.

AUTERFOITS CONVICT.

See RECORD.

AUTHOR.

See COPYRIGHT.

AVOWRY.

And see DISTRESS—REFLEVIN.

I. For Poor-rate.

See RATE, 10.

AWARD.

See ARBITRAMENT—ENCLOSURE.

BAIL.

And see STAMP, 1.

1. Special bail in an action in this Court, by bill, were liable to the amount of debt and costs recovered, such amount not exceeding double the sum sworn to. *Blaney v. Holt, Blaney v. Fardell*. 529

BAILIFF.

See CORPORATION—EVIDENCE, 10.

BANKRUPT.

And see EMBRACERY—TROVER, 4.

I. Cases upon 6 Geo. 4, c. 16, s. 2.
(*Act of Bankruptcy.*)

1. An assignment by a trader of all his estate and effects for the benefit of all his creditors, executed by the trader, but not executed by the trustee, or by any creditor, or further acted on, is an act of bankruptcy, *Botcherley v. Lancaster*. 383
2. A sale to a *bonâ fide* purchaser of the whole of a trader's stock in trade, with an intention on the part of the trader to abscond with the money and cheat his creditors, is not an act of bankruptcy. *Baxter v. Pritchard*. 138
3. A fair and *bonâ fide* sale of the whole of a trader's property, is not of itself an act of bankruptcy. *Rose v. Haycock*. 644 (a)

4. The party who impeaches the sale of the whole of a trader's property, must shew some acts from which fraud may be inferred. 644 (a)

II. Cases upon Section 12.

(*What passes to assignees as property "which the bankrupt could have departed withal."*)

5. *A.* bequeathed a house to *B.* for the residue of a term of years, if *B.* should so long live and continue to inhabit therein, and after *B.*'s decease or giving up the possession, he bequeathed the house to *C.*, the wife of *B.*, for the remainder of the term, in case she should so long live therein and remain the widow of *B.*, with further limitations to the issue of *B.* *B.* enters with the assent of the executors of *A.*, and afterwards, being in insolvent circumstances, goes to sea for six months. *C.* continues to occupy the house and to carry on *B.*'s trade therein. During the absence of *B.* a commission of bankrupt issues against him. After his return, *B.* continues the occupation and the business until the house is sold by his assignees, when *B.* and *C.* are turned out of possession by the vendee. *B.* dies. *C.* remaining a widow demands possession: Held, that the bequest to *C.* did not in equity enure as a limitation to her separate benefit,—and that her executory estate passed to the assignees of *B.* as being such an interest as *B.* could have lawfully departed withal. *Doe v. Steward and others.* 372
6. Held also, that *B.*'s going to sea on account of insolvency, was not a ceasing to inhabit or giving up of possession, so as to defeat his life estate. *Ibid.*
7. Nor his being turned out of possession; *Semble.* *Ibid.*

III. Cases upon Section 72.
(*Reputed Ownership.*)

8. Upon the assignment of a simple

contract debt, the assignor must be considered as having the order and disposition of the debt with the consent of the true owner, until the debtor has notice of the assignment. *Buck v. Lee.* 580

9. Such debt will therefore pass to the assignees of a bankrupt, by virtue of 6 Geo. 4, c. 16, s. 72, and to the assignees of an insolvent debtor under 7 Geo. 4, c. 57, s. 31. 580
10. To entitle the assignees of a bankrupt under the 72d section, it is not sufficient to shew that the goods were in the order and disposition of the bankrupt with the consent of a party, who was permitted by the true owner to deal with them as his own, but the consent must move directly from the true owner to the bankrupt. *Fraser v. Swansea Canal Company.* 391

And see *TROVER*, 4.

IV. Certificate.

See *SETTLEMENT*, 13.

BAPTISM.

See *EVIDENCE*, 27.

BARON AND FEME.

See *AGENT*, 1—*BANKRUPT*, 5—*CONSPIRACY*, 1—*EVIDENCE*, 26, 27—*FRAUD*, 2.

BARRISTER.

And see *ATTORNEY*, 5.

- I. *Privilege from Arrest*, see 213, n.

BENCHER.

See *INNS OF CHANCERY*.

BENEFICE.

See *ANNUITY—PRACTICE*.

BENEFICIAL OCCUPATION OF
LAND.

See *RATE*.

BENEFIT SOCIETY.

See SAVINGS' BANK, 1, 2, 3.

BEER.

And see CHARTER, 1.

1. The carrying on by *A.* of the business of retailing beer in a public house, in the name and by the agency of *B.*, the person licensed by the magistrates, is not a fraud on the licensing system. *Brooker v. Wood.* 96
2. A sale to *A.*, therefore, for the purposes of such trade, is valid. *Ibid.*

BILL OF COMPLAINT.

I. In Chancery.

See EVIDENCE, 12.

II. In the King's Bench.

And see BAIL.

1. Plene administravit, and no assets at the time of exhibiting of the bill, pleaded after the uniformity of process act, (2 Will. 4, c. 39,) was held, after verdict, to refer to the commencement of the suit. *Rees, Gent. one &c. v. Morgan.* 205

BILL OF COSTS.

See ATTORNEY—COSTS.

BILLS AND NOTES.

And see EVIDENCE, 23—MINOR—PLEADING, 5—OVERSEER, 3.

I. Transfer of Property in.

1. The right of action upon a bill accepted for value, may be transferred by indorsement without value, and by way of gift. *Heydon v. Thompson, Gent. one &c.* 319
2. To an action by an indorsee for value, of a bill which has been lost, it is no defence that the bill was taken under circumstances which ought to have excited the suspicion of a prudent and cautious man. *Crook v. Jadis.* 257
3. Nothing short of gross negligence will be an answer. *Ibid.*

4. To an action by an indorsee against an indorser, who had lost the bill by accident, it is no answer that the plaintiff took the bill under circumstances in which a prudent or cautious man would not have taken it without inquiries as to the title of the holder, unless the circumstances be such as to raise an inference of mala fides. *Backhouse v. Harrison.* 188

5. Negligence on the part of the loser of a bill of exchange, in not publishing his loss, will not cure any defect in the title of a subsequent holder, in respect of the mode in which the bill came into the possession of the latter. *Ibid.*

6. In an action by *B.* indorsee, against *C.* acceptor, *C.* pleads that the acceptance was obtained from him without consideration and by the fraud of *A.* the drawer, and was indorsed to *B.* without consideration and with notice of the fraud and of the want of consideration as between *A.* and *C.* *Scoble*, that *B.* may reply, merely traversing the fraud. *Heydon v. Thompson, Gent. one &c.* 319

7. If, however, *B.* newly assign a different bill, accepted generally, and the defendant pleads as before, omitting the statement of the original want of consideration, a replication to such plea, merely traversing the fraud, is sufficient. *Ibid.*

8. The circumstances of fraud stated in the plea being that the defendant wrote his name and a qualified acceptance on blank stamped paper, and delivered it to the drawer for the purpose of his drawing thereon a bill at nine months, but that the drawer drew upon such paper a bill at six months; the Court held, that a replication merely denying that the defendant wrote his name and a qualified acceptance on blank stamped paper, in manner and form &c., sufficiently put in issue the whole fraud. 319

II. Notice of Dishonour.

9. A letter written by the drawer to the holder, six days after the day on which the drawer should have received notice of dishonour, and containing ambiguous expressions respecting the non-payment of the bill was held to be properly left to the jury, as evidence from which they might or might not infer that notice had been given on the proper day. *Booth and others v. Jacobs and another.* 351

BIRTH.

See EVIDENCE, 27.

BISHOP.

And see SEQUESTRATION.

1. Whether the bishop must of necessity be made a party to a rule nisi, to set aside a sequestration granted by him, *quære.* *Bishop v. Hatch, Chuter v. same.* 498

BONA FIDE PURCHASE.

See BANKRUPT, 3, 4, 5.

BOND.

And see ESTOPPEL, 1.

I. Construction of.

1. Upon the marriage of *A.* with *B.*—the widow and successor of *C.*, a trader—*A.*, in consideration of the stock in trade which he receives with *B.*, gives a bond to *D.*, conditioned to pay to the children of *B.* by *C.*, within twelve months after her death, 300*l.*, if upon an account taken the stock in trade and effects of the business, if then carried on by *A.*, shall amount to 400*l.*; but in case upon such account the stock in trade shall amount to less than 400*l.*, then *A.* shall pay to such children 120*l.* *A.*, during the lifetime of *B.* discontinues the trade,

and ceases to have any stock: Held, that this obligation is discharged. *Berwick v. Swindells.* 159

II. When suable.

2. A bond conditioned for the payment of a certain sum, with interest, may be put in suit without a previous demand of payment. *Gibbs and another v. Southam.* 155

BUILDINGS.

See COMPENSATION—NEGLIGENCE.

BUTTER.

See CONTRACT, 3.

CANAL COMPANY.

See CERTIORARI—COMPENSATION—TROVER.

CAPIAS AD RESPONDENDUM.

1. The Court will not amend a defective writ of capias. *Hodgkinson v. Hodgkinson.* 564
2. A defendant taken upon a capias is entitled to be discharged, if between the writ and the copy served upon him there is a variance either in the *sound* or in the *sense* of the words. *Ibid.*
3. As where in a capias the address was to the Sheriff of *Middlesex*, and in the copy, to the Sheriff of *Middesex.* *Ibid.*

CARRIAGE.

See INNKEEPER.

CASE, ACTION ON THE.

See DEFAMATION—NUISANCE.

CERTIFICATE.

I. By Judge.

See COSTS, 6.

II. *By Arbitrator.**See* ARBITRAMENT, 4.III. *Of Bankrupt.**See* SETTLEMENT, 13, 14.IV. *Of Registry of Ship.**See* CONVICTION, 1.

CERTIORARI.

And see APPEAL—COSTS, 5.I. *How obtained.*

1. Held, that a judge's order or fiat for a certiorari to issue in vacation can only be granted nisi. *Rex v. Inhabitants of Chipping Sodbury.* 104

II. *Operation of.*

2. A certiorari removing an order of sessions, which order, upon being sent back for re-statement, is reversed by them, does not operate to remove the new order of sessions. *Rex v. Bloxam.* 385
3. The party complaining of the second order is the party who must remove it. *Ibid.*
4. A certiorari does not operate to remove an order of sessions made more than six months before, though the delay was occasioned by causes over which the prosecutor had no control. *Ibid.*

III. *When taken away.*

5. Where an act of parliament, enabling a company to make certain canals, &c. directs that questions of compensation, &c. shall be tried by a jury, before the justices at quarter sessions, and expressly takes away the certiorari; and a subsequent act, (enabling the company to make certain other canals,) directs that the former act, and all the powers, provisions, exceptions, rules, remedies, regulations, penalties, forfeitures, articles, matters, and things therein contained, shall be in full force, and shall ex-

tend to and be used, executed, applied, enforced, and put in execution, to all intents and purposes, as to that act and the several matters and things therein contained, for making and maintaining the canals, &c. to be made by virtue of that act, and for carrying the several purposes of that act into execution in as ample and beneficial a manner, to all intents and purposes, as if the same had been respectively re-enacted in the body of that act: Held, that the clause taking away the certiorari must be considered as embodied in the latter act. *Rex v. The Justices of the West Riding of Yorkshire,—In the matter of the Aire and Calder Navigation.* 802

6. And in such case the Court will not grant a mandamus to the justices or clerk of the peace to enter up judgment upon the verdict of a jury otherwise than in the terms in which it is given by the jury, even though it appear by affidavit that in ascertaining the amount of damages to be assessed by them, they took into consideration matters not properly within their jurisdiction. *Ibid.*
7. So though it should appear upon the face of the proceedings that the jury have assessed *separate* damages in respect of matters foreign to their jurisdiction. *Ibid.*
8. But such a finding would be a nullity, and could not be enforced. *Ibid.*

CHAIRMAN.

See VESTRY, 10.

CHARGEABILITY.

See CONSPIRACY.

CHARTER.

I. *Construction of.*

1. By ancient charters the king, being seised of toll traverse, grant-

ed to a dean and chapter, for themselves and their freeholders and other men, that they should be quit of toll: Held, that a copyholder who makes beer *for sale* upon premises holden by him of the dean and chapter, and within the Liberty of the church, throughout which the dean and chapter possess jurisdiction by virtue of the charters granted to them, is exempt from the payment of tolls in respect of a cart laden with such beer. *Lord Middleton and others v. Lambert.* 841

2. A *fortiori* is he exempt from payment of tolls in respect of sheep, part of his farming stock on his copyhold, going to a fair to be sold. *Ibid.*

3. Whether, if one of the *ecclesiastical body* had claimed to be free from toll in respect of *merchandise*, the charter would have been held to give to him such an immunity, *quære.* *Ibid.*

CHARTER-PARTY.

See SHIP.

CHATTEL INTEREST.

See ANNUITY.

CHURCHWARDENS.

See MANDAMUS, 1—OVERSEERS.

CLERGYMAN.

See ANNUITY—PRACTICE.

CLERK.

See SETTLEMENT, 8, 12, 13, 14, 15.

CLERK OF THE PEACE.

See QUARTER SESSIONS.

CLERK TO TURNPIKE TRUSTEES.

See TOLLS, 5.

COGNOVIT.

And see AGREEMENT, 1—PRACTICE, 2.

1. Where in a cognovit it is stipulated that judgment shall not be entered up until after the final hearing of a Chancery suit, and final decree or order thereupon, when, in the event of the final decree or order being in favour of the plaintiff, the judgment and execution upon the cognovit are to operate in accordance with the decree or order, and the plaintiff is to be entitled to levy for the amount decreed, and no more: the plaintiff is not authorized to enter up judgment, pending an appeal to the Lord Chancellor against a final decree at the Rolls dismissing the defendant's bill. *Jones v. Reynolds.* 465

COLLUSION.

See FRAUD—INSOLVENT DEBTOR, 3.

COMMITMENT FOR RE-EXAMINATION.

See JUSTICES, 3.

COMPENSATION.

And see CERTIORARI.

1. A public company is by statute empowered to hold lands and to purchase certain scheduled messuages, and is required to make compensation by a particular process to persons "damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purposes or otherwise in the execution of the act." The company purchased a house not mentioned in the schedule, and in pulling it down injured the adjoining house: Held, that the tenant of the adjoining house was not entitled to compensation by the process provided by the act. *Rex v. The Hungerford*

Market Company, Ex parte Eyre.

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2. A company for effecting improvements in a town, is empowered by statute to take certain lands, &c. upon giving notice and making compensation; the amount of compensation, if not agreed upon, to be ascertained by a jury; and it is provided, that in case the jury shall assess the damages at more than was offered, the company shall pay "the costs of the notices and precepts, and of summoning the jury and witnesses, and also of the inquest:" Held, that a party whose property was assessed at more than the sum offered, was entitled to his *general* costs attending the trial, but not to expenses of surveying. *Rex v. The Justices of the City of York.* 685
3. Whether, when an act for making canals, &c. authorizes the summoning a jury "to ascertain what sum, &c. shall be paid by way of recompense either for the damages before that time sustained, or for the future temporary or perpetual continuance of any recurring damages occasioned, and the time or occasion of which shall have been only in part obviated, repaired, or remedied, and which can or will be no further repaired or remedied," the jury can assess compensation in respect of prospective damages when no previous damage has been sustained, *quere.* *Rex v. The Justices of the West Riding of Yorkshire,—in the matter of the Aire and Calder Navigation.*

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COMPROMISE.

See COSTS.

CONDITION.

See AGREEMENT—BOND.

CONSEQUENTIAL DAMAGE.

See COMPENSATION, 1, 3—DEFAMATION, 1—NEGLIGENCE.

CONSIDERATION.

See ACTION—BILLS AND NOTES, 1, 2, 6, 7—EVIDENCE, 26—FRAUDS, STATUTE OF, 1, 3.

CONSPIRACY.

And see STATUTE.

I. When an Indictable Offence.

1. A conspiracy to procure a marriage between poor persons of different parishes for the purpose of exonerating the parish of the woman and charging the other parish, is not an indictable offence, unless the parties were unwilling to marry, or some forcible or fraudulent means of bringing about the marriage were resorted to. *Rex v. Seward and others.* 557
2. A conspiracy to exonerate from the prospective burthen of maintaining a pauper not at the time actually chargeable, and to throw the burden upon another parish by means not in themselves unlawful, is not indictable. *Ibid.*

II. How charged.

3. In such an indictment a statement that the female was a poor unmarried woman with child, is not equivalent to a statement of actual chargeability. *Ibid.*

CONSTRUCTION.

See AGREEMENT—BOND—COGNOVIT—CONTRACT—PLEADING, 8, 9—POWER—STATUTE.

CONTEMPT.

See ARREST—PRACTICE, 4.

CONTRACT.

And see EXECUTOR—FRAUD—OVERSEER—SHIP—TOLL.

I. Legality.

1. The carrying on by A. of the

business of retailing beer in a public-house, in the name and by the agency of *B.*, the person licensed by the magistrates, is not a fraud on the licensing system.

Brooker v. Wood. 96

2. A sale to *A.* therefore, for the purposes of such trade, is valid. *Ibid.*

3. Where a statute contains regulations for the protection of buyers against the fraud of sellers, a seller cannot recover for the price of goods sold in contravention of the regulations, although the statute, whilst it imposes a penalty upon the seller, does not in terms prohibit such a sale. *Foster v. Taylor.* 244

4. Where, therefore, butter was sold in firkins not branded according to the provisions of acts (36 *Geo.* 3, c. 8, and 38 *Geo.* 3, c. 73,) "to prevent abuses and frauds in the packing, weighing and sale of butter," which required that makers of vessels for the packing of butter should brand them with their names, under a pecuniary penalty, and that sellers of butter should, under a further penalty, use vessels so branded, and brand their own names; it was held that an action for the price could not be maintained. *Ibid.*

5. *Secus*, in the case of a breach of a mere revenue regulation, which is enforced by a penalty. *Ibid.*

II. *Bona fides.*

6. A horse is sold with a warranty of soundness for twenty-four hours: Held, that mere knowledge of unsoundness, on the part of the seller, does not vitiate the sale. *Bywater v. Richardson.* 748

III. *Construction.*

7. Certain rules were posted up at a repository for horses, regulating sales by private contract there: Held, that parties contracting at

the repository, having notice of the rules, impliedly adopted the terms of them. 748

IV. *Proof.*

8. Upon a sale of houses by auction, according to certain particulars and conditions of sale, one of which was for the delivery of an abstract of title within ten days, and another for the payment of a deposit to the auctioneer, the purchaser of two houses pays a deposit, signs an agreement as purchaser, and obtains a receipt from the auctioneer for the money paid as "for a deposit on a sale by auction of the premises described in the particulars and conditions of sale." The abstract of title not being delivered, the purchaser brings an action against the auctioneer for the recovery of the deposit: Held, that the production of the receipt and of the conditions of sale, without producing the written contract signed by the purchaser, was insufficient. *Curtis v. Greated.* 449

CONTRIBUTION.

I. *Between Partners.*

1. *A.* recovers against *B.*, *C.* and *D.*, partners in trade, upon their joint contract in respect of a partnership transaction, and takes in execution *B.* only, who thereupon pays the whole sum recovered. *B.* cannot, at law, recover against his co-defendants for contribution. *Sadler v. Hickson.* 258

2. The remedy of *B.* is in equity, as in cases of a voluntary payment, by one partner, of a debt due from himself and his copartners upon their joint contract, in respect of a partnership transaction. *Ibid.*

CONVEYANCE.

See EMBRACERY.

CONVICTION.

And see ERROR, 8, 9.

I. *Insufficiency.*

1. A conviction under 6 Geo. 4, c. 110, s. 27, and 3 & 4 Will. 4, c. 55, s. 27, for detaining the certificate of a ship's registry, is bad, unless it state the *purpose* for which the certificate was wanted, and that the person who demanded it was the *proper officer*. *Rex v. Walsh.* 632
2. In a conviction for a forcible detainer, under 8 Hen. 6, c. 9, where the magistrates proceed *upon view*, it is not necessary to set out the particular facts presented to their view. *Rex v. Wilson.* 753

II. *Insufficiency, how cured.*

3. The 3 Geo. 4, c. 23, s. 3, does not cure an omission, in a conviction, of the statement of a circumstance necessary to constitute the offence. 632

COPY OF CAPIAS.

See CAPIAS AD RESPONDENDUM.

COPYHOLD.

And see SETTLEMENT, 5—TOLL.

I. *Admittance.*

1. *A.* surrenders a copyhold to such *uses as B. shall appoint*, and in default of and until appointment, to *B.* in fee. *B.* appoints to *C.* The lord is bound to admit *C.* without requiring the previous admission of *B.* *Rex v. Lord of the Manor of Oundle.* 484

II. *At what place Grants, &c. may be made.*

2. A lord may grant a copyhold, and admit the tenant, not only out of court, but also out of the manor. *Doe d. Roberts and Leach v. Whitaker.* 225
3. A grant by the lord in person is good, although it purport to be made at a court *within* the manor,

when in fact it was held *out* of the manor. 225

4. The *steward* of a manor may *take a surrender* out of court. 225
5. But a steward cannot *admit* out of court. 225
6. But a voluntary grant, made by the steward at a court held off the manor, is sufficient, where such steward is also clothed with a power of attorney, which expressly authorizes him to make voluntary grants. 225
7. So, although the grant purport to be made by such steward, *as steward*, and without any reference being made, in the grant, to the special authority. 225

III. *Completion of Customary Title.*

8. In order to constitute the grantee of a copyhold a perfect customary tenant, where the grant is made out of court, such grant must be notified at the next customary court, or at such other subsequent court as the custom points out, and must be entered on the rolls of the court. 225
9. But it is sufficient if, having been entered on the court rolls at a void court, it appears on the court rolls at a subsequent good court, and is not then objected to by the tenants. 225
10. It is no objection to a copyhold grant that it is made upon the surrender of a former grantee in remainder, whose admittance had, upon such former grant, been expressly respited, and of whose admittance at any subsequent time, there was no entry in the court rolls. 225
11. Nor is it an objection to the grant of several customary tenements, by one copy of court roll, that several rents are reserved, without specifying which is reserved out of each tenement, it appearing that former entire grants of the same several tenements have

- contained similar entire reservations. 225
12. Nor is it an objection that two heriots are reserved, where in former grants the reservation has been of one heriot only. 225

IV. Customary Court.

13. A customary court cannot, without a special custom, be holden out of the manor; and every thing done at a court so holden is void. 225
14. But the nullity of such court only affects things *required to be done at a court*. 225

COPYRIGHT.

1. The *assignee of the copyright* of a dramatic work, printed and published within ten years of the passing of 3 & 4 Will. 4, c. 15, and not the *author* who has assigned such copyright, is entitled to the sole *right of representing* the piece, or causing it to be represented. *Cumberland v. Planché*. 537
2. So, where the work is printed and published *subsequently* to the act, and, upon the assignment of the copyright, no reservation of the right to the exclusive representation is expressly made by the author. *Ibid*.

CORN.

See DISTRESS, 2—EVIDENCE, 19.

CORN-RENT.

See ENCLOSURE.

CORPORATION.

I. Appointment of Officers.

In trover against a corporation, for the value of goods unlawfully taken by way of distress under the direction of the clerk to the corporation, it is sufficient to give general evidence of authority to distrain, without shewing an appointment under seal. *Smith v. Birmingham Gas Light Company*. 771

COSTS.

And see ACTION, 1, 2—AMENDMENT, 3—ATTORNEY—COMPENSATION—DISTRESS, 3, 4—ECCLESIASTICAL COURT—HIGHWAY.

I. As between Attorney and Client.

1. An action between *A.* and *B.* is compromised, *B.* undertaking to pay *A.*'s costs as between attorney and client. The bill of costs of *A.*'s attorney being taxed, more than a sixth is taken off. The attorney is liable to pay the costs of the taxation to *B.* *Sadler v. Palfreyman*. 598
2. *A.* agrees to pay the costs of *B.* as between attorney and client. *A.* is entitled to have the attorney's bill taxed. *Ibid*.

II. Double Costs.

3. The double costs given to magistrates by 21 Jac. 1, c. 12, s. 5, are those costs only which are recoverable in the ordinary course of law, doubled. *Thomas v. Saunders*. 572
4. Therefore where in false imprisonment against magistrates within 21 Jac. 1, the plaintiff obtains an order for changing the venue, for the purpose of securing an impartial trial, in which order he undertakes to pay to the defendants all the *extra costs* necessarily occasioned by such cause being tried in the county where the trial was ordered to be had, the defendants are not entitled to have such extra costs doubled. *Ibid*.

III. In Criminal Proceedings.

5. In the case of an indictment removed into K. B. by certiorari, the Court has no power to order the payment of costs incurred *before the removal*. *Rex v. Pasman*. 730

IV. Certificate against.

6. The judge of an inferior Court, to whom a cause is sent by writ of

trial, cannot certify to deprive the plaintiff of costs where less than 40s. is recovered. *Wardroper v. Richardson.* 839

V. *In Actions by Executors.*

See EXECUTOR, 4.

VI. *Costs of Taxation.*

And see ante, 1, 2.

7. The Court refused to require an attorney to pay the costs of taxation, where the deduction beyond one-sixth was occasioned by the entire disallowance of one of the bills delivered, on the ground of non-liability. *Mills v. Revett.* 767
8. Where less than one-sixth is upon taxation struck off an attorney's bill, the Court will as a matter of course order the client to pay the costs of taxation. *Ibid.*

VII. *Taxation of Costs.*

And see FINAL JUDGMENT.

9. Where the master has in his discretion allowed, upon taxation, the expenses of the witnesses of the successful party, at the assize town for several days during which their attendance was not in fact necessary, the Court will not interfere with the master's decision, unless mala fides be shewn in such successful party,—as an intention unnecessarily to increase the costs. *Thomas v. Saunders.* 572
10. Previously to the assizes the plaintiff serves on the defendant a notice, importing that the cause will not be called on until the fourth day after the commission day, and that he shall object, upon the taxation of costs, to any allowance for the time and expenses of the defendant's attorney and witnesses beyond what would be necessary if the trial should be had before that day, and that he undertakes to withdraw the record if the cause should be called on before. The defendant is not bound to pay any attention to such notice. *Ibid.*

11. *Semble*, that such notice served on the day before the commission day, after all the necessary arrangements had been made for conveying the witnesses to a distant assize town on the following day, would be too late, supposing it to be otherwise good. 572

COURT ROLLS.

See COPYMOLD, 8, 9, 11.

COURTS.

I. *Customary Courts.*

See COPYMOLD, IV.

II. *Ecclesiastical Court.*

See ECCLESIASTICAL COURT.

III. *Exchequer Chamber.*

See EXCHEQUER CHAMBER.

IV. *Inferior Court.*

See COSTS, IV.—ERROR, 1, 2, 3, 4—NEW TRIAL.

V. *Court of Quarter Sessions.*

See APPEAL, 1, 2, 3—JUSTICES, IV.—QUARTER SESSIONS.

VI. *Court of Requests.*

See SUGGESTION.

COVENANT.

I. *To Repair.*

See LEASE, 2, 3.

CRIER.

See QUARTER SESSIONS, 3.

CRIMINAL INFORMATION.

And see STATUTE.

I. *Affidavit in support of Rule.*

1. *Semble*, that an affidavit to found a criminal information for a libel published in England upon a person being in parts beyond seas, may be sworn abroad. *Rex v. The Editor of the Satirist.* 532

CUSTOM.

See EMBLEMENTS, 1.

CUSTOMARY COURT.

See COPYHOLD, IV.

CUSTOMARY ESTATE.

See COPYHOLD.

DAMAGES.

See CERTIORARI, 6, 7, 8—COMPENSATION, 3.

DATE OF LETTER.

1. A letter is to be presumed to be written on the day on which it is dated, until the contrary is shewn. *Hunt v. Massey.* 109

DEBTOR AND CREDITOR.

And see INSOLVENT DEBTOR—PARTNERS.

1. A party charged in execution for damages recovered in an action for an assault, is within the parview of 48 Geo. 3, c. 123, "An act for the discharge of debtors in execution for *small debts* from imprisonment in certain cases." *Winter v. Elliott.* 315

DECEASED WITNESS.

See EVIDENCE, 2 to 8.

DECLARATIONS.

See EVIDENCE, 20.

DECREE, FINAL.

See COGNOVIT.

DEED.

See PLEADING, 6, 7—STAMP, II.

DEFAMATION.

1. To support an action for defamatory words actionable only in respect of special damage, it is not necessary that the person, whose

act has caused the special damage, should have *believed* the defamatory charge, provided that he *acted in consequence* of the words having been spoken. *Knight v. Gibbs.* 467

2. A defamatory communication by A. to B. respecting the inmates of the house occupied by B. as tenant to A., is privileged when such communication is made *bonâ fide* in consequence of the relation of landlord and tenant, and without malice in fact. *Ibid.*

3. Words are not actionable with special damage unless they are of themselves *disparaging.* *Kelly v. Partington.* 116

4. In an action of slander for words spoken of the plaintiff as a physician, importing a denial that the plaintiff is duly qualified to practise as a physician, the plaintiff must, under the general issue, prove the inducement in the declaration alleging that the plaintiff had exercised the profession of, and was, a physician, and shew not only that he *practised* as a physician, but also that he practised *lawfully.* *Collins v. Carnegie.* 703

And see CRIMINAL INFORMATION.

DEMAND.

I. *Of Payment.*

See BOND, 2.

II. *Of Rent.*

1. Where a rent charge is granted with power to enter and enjoy the lands charged, and to take the rents, issues, and profits, until satisfaction of the arrears, with costs, the grantee may, upon the rent charge becoming in arrear, maintain ejectment against the tenant without a previous demand. *Doe d. Bias v. Horsley.* 567

DEMISE.

See EJECTMENT, II.—LANDLORD AND TENANT—SURRENDER.

DEMURRER.

See MANDAMUS, 3, 4.

DEPOSIT.

See SAVINGS BANK.

DEVISAVIT VEL NON.

See EVIDENCE, 2, 3, 12.

DEVISE.

See BANKRUPT, II.—POWER.

DIPLOMA.

See MEDICINE, 3.

DISBURSEMENTS.

See ATTORNEY, 2.

DISCHARGE.

I. *Out of Custody.*

See ARREST—DEBTOR AND CREDITOR.

II. *Under Insolvent Act.*

See OUTLAWRY.

III. *Of Cargo.*

See INSURANCE.

DISCLAIMER, See 288, n.

DISSOLUTION OF CONTRACT.

See SETTLEMENT.

DISTRESS.

I. *For Rent Charge.*

1. The goods of *C.* found upon land out of which a rent charge has been granted by *A.* to *B.*, are liable to the distress of *B.*, unless *C.* has an interest in the land paramount to that which *A.* had at the time of the grant. *Saffery v. Elgood.* 346

II. *Of Growing Crops.*

2. Growing corn, sold under a *fi. fa.*, is not distrainable for rent accruing due after the seizure in execution. *Wright v. Dewes.* 790

III. Costs of Distress.

3. There is no statutory limit to the amount of costs and charges for levying and impounding a distress for rent above 20*l.*, where it is impounded on the premises by virtue of 11 *Geo.* 2, c. 9, s. 10. *Child v. Chamberlain.* 520
4. The provisions of 57 *Geo.* 3, c. 93, regulating the costs and charges for levying and disposing of a distress for rent under 20*l.*, do not apply to a case of distress taken for more than 20*l.*, though made upon goods appraised at and sold for less than 20*l.* *Ibid.*

IV. Authority to Bailiff.

See CORPORATION.

DISTRINGAS JURATORES.

See ERROR.

DOCKET.

See PRACTICE, IV.

DONATIO MORTIS CAUSA.

See EVIDENCE, 17, 18.

DOUBLE COSTS.

See COSTS, II.

DRAMATIC WORKS.

1. Where the author of a dramatic work, printed and published within ten years of the passing of 3 & 4 *Will.* 4, c. 15, has assigned his interest, the assignee, and not the author, is entitled to the sole right of representing the piece, or causing it to be represented. *Cumberland v. Planché.* 537
2. So, where the work is printed and published subsequently to the act, and upon the assignment of the copyright, no reservation of the right to the exclusive representation is expressly made by the author. *Ibid.*

EASEMENT.

See LICENCE.

ECCLESIASTICAL BODY.

See TOLL.

ECCLESIASTICAL COURT.

I. *Costs.*

1. An attorney is authorized to insert in his bill of costs, the amount paid to a proctor employed by him for his client. *Franklin v. Featherstonhaugh.* 779
2. In taxing the attorney's bill, the master is not bound to inquire into the reasonableness of the bill so paid to the proctor. *Ibid.*
3. In considering whether more than one-sixth of such attorney's bill has been taxed off, the entire amount of the bill must be taken *inclusively* of such proctor's bill. *Ibid.*
4. According to the practice of the Ecclesiastical Court, a bill of costs cannot be taxed as between proctor and client. *Ibid.*

EJECTMENT.

And see DEMAND—ESTOPPEL—EVIDENCE, 2 to 8, 12, 26.

I. *Title of Lessor.*

1. In ejectment, it is no answer to a *prima facie* title from 20 years' possession, that such possession was in continuation of that of a sister who entered by abatement into the land to which her brother (whose issue is alive) was entitled as heir, and who died more than 20 years before the ejectment was brought. *Doe d. Draper v. Lawley.* 331

II. *Form of Demise.*

2. The nominal plaintiff in ejectment, cannot recover upon a *joint* demise from persons who are shewn to be *tenants in common*. *Doe d. Poole and another v. Errington.* 646

III. *Title of Defendant.*

3. *A.* having mortgaged to *B.*, demises to *C.*, reserving a power of

re-entry, and afterwards mortgages to *D.*, all his interest; *C.* may set up the title of *D.*, as an answer to an ejectment brought by *A.*, under the clause for re-entry. *Doe d. Marriott v. Edwards and others.* 193

IV. *Evidence.*

4. In ejectment against *A.* on the demise of *B.*, a mortgagee of *C.*, a recovery in a former ejectment, brought subsequently to the mortgage, on the demise of *A.* against *C.*, is inadmissible in evidence for the defendant. *Doe d. Smith v. Webber.* 746
5. So, although on the first occasion *B.* was examined as a witness on behalf of *C.* *Ibid.*
6. So, although the second action is brought on the several demises of *B.* and *C.*,—if the plaintiff elects to rely on the demise of *B.* only. *Ibid.*

EMANCIPATION.

See SETTLEMENT, V.

EMBLEMENTS.

And see DISTRESS, 2.

1. A tenant whose tenancy is determined after Lady-day by an agreement, which is silent as to way-going crops, is not entitled to such crops under a custom which gives to the tenant such crops upon a regular expiration of a Lady-day tenancy. *Thorpe v. Eyre.* 214

EMBRACERY.

1. Whether a conveyance by assignees of a bankrupt, where neither bankrupt nor assignees have been in possession within a year, amounts to embracery, *quære*. *Doe d. Oliver v. Powell.* 616

ENCLOSURE.

1. By an act for enclosing lands and extinguishing tithes, the com-

missioner is directed to value the tithes, and find an equivalent corn-rent; and by his award, or some previous writing under his hand to be annexed thereto, to set forth the same, and to apportion the corn-rent; and a power is given to appeal to the quarter sessions held within four months next after the cause of complaint shall have arisen. The commissioner having determined the amount of the corn-rent by a previous writing, which afterwards is annexed to the award: Held, that an appeal by the rector, on the ground of the inadequacy of the corn-rent, must be within four months of the making of such previous writing, and that an appeal within four months of the date of the award is not in time. *Rex v. Nockolds and others.*

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2. *Semble*, that no notice of the corn-rent's having been fixed by the previous writing, was requisite, though the act required that all notices necessary to be given by the commissioner should be given in a particular way eight days before the period for doing the business to which such notice should relate. *Ibid.*
3. But held, that supposing that the four months could not be allowed to run until the party aggrieved had notice that his rights had been affected, notice given by the commissioner in the manner required by the act in *other* cases is sufficient, although the notice, which states in general terms what had been done, refers for particulars to a schedule deposited at a distant place. *Ibid.*
4. Held, also, that parol notice is sufficient. *Ibid.*
5. Corn-rent substituted for tithes, is in general liable to parochial burthens. 331
6. Whether corn-rent would be so liable where the commissioner un-

der an inclosure act being directed by the act to value the tithes as equal to a fixed proportion of the *net annual value* of the lands, in making the calculation, deducts from the gross value of the land a sum estimated by him as the amount of the parochial burthens.

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ENTRY.

See DEMAND, II.

ERROR.

1. A Court of Error is bound by the transcript of a record, which is sent up under the rule to certify the record. *Salter v. Slade* (in error.) 717
2. Such transcript is to be considered, in the Court of Error, as the record of the Court below. *Ibid.*
3. The Court of Error cannot amend such transcript. *Ibid.*
4. Whether an inferior Court of Record can, after verdict, amend the pleadings, *quære.* *Ibid.*
5. Whether any court can do so, *quære.* *Ibid.*
6. Whether in *indebitatus assumpsit* in an inferior court, an omission to state that the *debt accrued* within the jurisdiction, (it being alleged that the defendant *was indebted* within the jurisdiction, and that the *promise was made* there,) is error, *quære.* *Ibid.*
7. The want of a panel to the *distingas juratores*, is error; and the defect is not cured by the statutes of *jeofails.* *Rogers v. Smith.* 760
8. Where error is brought on a conviction of felony, and after a four-day rule has been obtained and served on the attorney-general and the prosecutors, there is no joinder in error, the party convicted is entitled to be discharged out of custody. *Rex v. Howse and Thompson.* 462
9. So in error upon a conviction for a misdemeanor. *Ibid.*

ESTATE.

And see PRIVACY OF ESTATE.

I. *Tenant in Common.*

1. The nominal plaintiff in ejectment cannot recover upon a joint demise from persons who are shewn to be tenants in common *Doe d. Poole and another v. Errington.* 646

ESTOPPEL.

And see EJECTMENT, 3—FRAUD, 1.

I. *What shall amount to an Estoppel.*

1. The obligor of a bond conditioned for the payment of rent at the rate of 170*l.* a year, "according to an indenture of lease," is estopped, in an action on the bond, from saying (as the fact was,) that the rent reserved by the indenture was 140*l.* *Lainson v. Tremere.* 603

II. *Who estopped.*

2. In 1818 *A.* conveys to *B.* *B.* becomes bankrupt, and his assignees convey in 1833 to *C.* In 1824 *A.* conveys to *D.* It is competent to *D.*, in ejectment brought against him by *C.*, to shew, that in 1818 *A.* had not the legal estate. *Doe d. Oliver v. Powell and Pyne.* 616

EVIDENCE.

See AGENT—ARBITRAMENT, 7—BILLS AND NOTES, 9—DEFAMATION, 4,—EJECTMENT, 4, 5, 6—ESTOPPEL—MALICIOUS ARREST—OVERSEER, 1, 4, 5, 6—SETTLEMENT, 6, 7, 8, 15, 17, 22, 26—STAMP, 2, 3, 4—VENDOR AND PURCHASER—WITNESS.

I. *Best Evidence.*

1. "You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount, together with the memorandum of my son's, making in the whole 45*l.*:" Held, in an action on this guarantee, that the memorandum referred

to need not be produced. *Shortrede v. Check.* 866

II. *Primary or Secondary.*

2. In ejectment, where the question is *devisavit vel non*,—evidence of the examination and cross-examination of one of the attesting witnesses to the will, who upon the trial of an issue out of Chancery between the same parties, and upon the same question, proved the execution of the will, and is since dead,—is admissible; and being admitted, is entitled to the same degree of weight as the *viva voce* evidence of an attesting witness. *Wright v. Doe d. Tatham (in error).* 268
3. Therefore a will is held to be sufficiently proved by evidence of such examinations, even where it appeared at the second trial that another attesting witness was alive and within the jurisdiction of the Court. *Ibid.*

III. *Res inter alios acta vel non.*

4. In order to let in evidence of the examination of a deceased witness upon a former trial upon the same question, it is sufficient if the parties be *substantially* the same. 268
5. It is therefore sufficient if in the former action a party was plaintiff or defendant, and in the other, lessor in ejectment. *Ibid.*
6. Nor is it material that one of the parties to the second action was in the former action joined with several others who are not parties to the second action. *Ibid.*
7. Nor, that the former evidence was given upon the trial of an issue, arising out of a bill in Chancery which has been dismissed upon the motion of the plaintiff in equity himself. *Ibid.*
8. Where by a rule of court made by consent previously to the trial of an ejectment, it is ordered that the short-hand writer's notes of the evidence on the trial of an issue should be read in evidence as to such wit-

nesses as might be dead or beyond sea, evidence given by the shorthand writer of the examination at the former trial of an attesting witness, since dead, who proved the execution of a will,—the due execution of which was in controversy on both occasions,—is not only admissible in evidence on the ground of the agreement in the rule, but being admitted, is not secondary evidence, but is evidence of as high a nature as that of a living attesting witness. 208

IV. Records.

9. A return of nulla bona, made by the sheriff to a fieri facias against *A.*, is admissible in evidence upon the trial of a question as to property in goods at the time of such return arising between *A.* and a succeeding sheriff. *Avril v. The Sheriff of Warwick and others.* 871
10. So, although the bailiff entrusted with the execution of such writ, did not himself search for goods of *A.*, but sent his assistant. *Ibid.*

V. Public Writings.

11. A memorandum indorsed upon an instrument, purporting to be an acknowledgment by the commissioners of stamps of the payment of a penalty, is not evidence. *Rex v. Inhabitants of Preston.* 31
12. A bill in Chancery, filed by *A.* against *B.* and others,—the answer of *B.* and his co-defendants,—an order of the Master of the Rolls directing an issue of devisavit vel non (the question in controversy between the parties),—and the nisi prius record, with the postea thereon, containing the finding of devisavit and judgment accordingly,—being admitted and read upon the trial of an ejectment by *Doe d. A.* against *B.*, in which the same question arose, are not even prima facie proof of the due execution of the will. 208

VI. Private Writings.

13. A letter is to be presumed to have been written on the day on which it is dated, until the contrary is shewn. *Hunt v. Massey.* 169
14. Upon a question as to the soundness of the mind of *A.* from the time of his attaining a competent age down to the time of the execution of his will,—Whether letters found amongst his papers shortly after his decease, and written to him at various periods by persons intimately acquainted with him, and since dead, are admissible in evidence to shew the manner in which he was treated by such persons,—*quare.* *Wright v. Doe d. Tatham.* 268
15. In an action by *A.* against *B.*, cannot object to the production of the title deeds of *C.* *Marston v. Downes and wife, executrix, &c.* 861
16. Nor, if *C.* refuses to produce them, can *B.* object to the reception of parol evidence of their contents. *Ibid.*

VII. Parol Evidence.

17. Upon the reading of the will of *A.* in the presence of her family, *B.*, who had resided with her, produced a parcel containing bank-notes, and stated that *A.* had given it to her about a fortnight before her death; upon which *C.*, the brother of *B.*, took up the parcel and said that he would keep the notes until *B.* should require them, or, as stated by other witnesses, until the claims of the executors should be disposed of: Held, that in an action by *B.* against *C.* for money had and received, evidence of what had been stated by *B.* was admissible to shew her title to the notes. *Haylip and wife v. Gwyer.* 479
18. Held also, that such statement, coupled with the evidence of possession,—of *B.*'s conduct at the time of reading the will,—of her having told her sister some days

- before the death of *A.* of the gift having been made to her,—and of the circumstance of other money of *A.*'s being untouched, was, although *B.* had had opportunities of possessing herself dishonestly of the notes, sufficient to go to the jury upon a question raised whether *B.* was justly entitled to them. 479
19. Perception of the tithe of corn is evidence of title to other rectorial tithes,—as hay. *Bayley v. Drever and others.* 885
20. Mere non-payment of tithes for upwards of twenty years, is no evidence of a grant or release, even as against a *lay impropriator.* *Ibid.*
21. Declarations made by the owner of an estate against his own interest, are admissible in evidence against his vendee, although such vendor be alive, and even in Court, at the time that his declarations are proposed to be used. *Wootway v. Rowe.* 849
22. Evidence of perambulations of a manor, made within living memory, is admissible upon a question of title to land, although neither the party against whom it is offered, nor any person in privity with him, was present at the perambulations. *Ibid.*
23. But such evidence is entitled to very little weight. *Ibid.*
- VIII. Upon particular Issues.
- And see DEFAMATION, 4.
Et vide supra.
23. Plea—set-off upon the plaintiff's promissory note, payable to the order of *A.* and indorsed to the defendant by the administrator of *A.* Replication—that the cause of set-off did not accrue to the defendant within six years. The making of the note, the grant of administration, and the indorsement, are admitted; and the defendant has merely to shew an acknowledgment within six years. *Gale v. Capron.* 863
24. In debt for not setting out tithes, it is competent to the plaintiff to give evidence of the perception of the tithes of the lands in question, by parties not shewn to be in privity of estate with the plaintiff, and to produce leases of the tithes granted by those persons to former occupiers of the defendant's land. *Bayley v. Drever and others.* 885
25. In an action against five defendants, as churchwardens and overseers, for goods furnished to the poor by their joint orders, it is sufficient for the plaintiff to prove that they all acted as churchwardens and overseers, and signed orders for the delivery of the articles furnished, although one of them be only an assistant overseer. *Kirby v. Bannister and others.* 119
26. In an ejectment brought by a person claiming under a post-nuptial settlement against a subsequent purchaser from the husband, declarations by the husband that he had received a valuable consideration from the purchaser, are not admissible in evidence. *Doe d. Sweetland and Hill v. Webber.* 586
- IX. Onus probandæ.
- See BANKRUPT, 4.
- X. Effect of Evidence.
- Et vide supra.*
27. Proof that *A.* and *B.* were married in the parish of Dale, and that their children, *C.*, *D.*, *E.* and *F.*, were baptized there, is not evidence from which the justices are bound to infer that *E.* was born there. *Rez v. Inhabitants of Lubbenham.* 37
- XI. Rejection of Evidence.
28. Where evidence is rejected, which is tendered for one purpose in respect of which it is inadmissible, but which is admissible in another view of the case not alluded to at the trial, the Court will not grant a new trial as upon an improper re-

jection of evidence. *Rea v. Grant and others.* 106

EXCESSIVE DISTRESS.

See RATE, 11.

EXCHEQUER CHAMBER.

1. The Court of Exchequer Chamber has jurisdiction, under 11 Geo. 4, & 1 Will. 4, c. 70, s. 8, to correct errors in judgments of the K. B. in criminal matters. *Wright v. The King*, (in error.) 892

EXECUTOR.

And see ASSETS—EVIDENCE, 23—
SUMMONS—PRACTICE, VII.

I. Liability for Expenses of Funeral.

1. An executor, who gives no orders, is liable only to the extent of the expenses of a funeral suitable to the rank and circumstances of the testator. *Brice v. Wilson.* 512
2. And it seems that he is not liable at all, where the funeral is ordered by, and on the credit of, another person. *Ibid.*

A widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant. The undertaker in his bill charged the widow, but subsequently applied for payment to the executor, who promised to pay. An action was brought against the executor in his own right, in which he suffered judgment by default. Held, that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow. *Ibid.*

II. Liability to pay Costs.

4. The 33d section of 3 & 4 Will. 4, c. 42, as to payment of costs by executors and administrators, in actions brought by them, was held, dissentientia *Littledale, J.*, to apply

to actions tried after the passing of the act, whether commenced before or not; although the cause had been made a *remand* before the passing of the act. *Freeman and others, Executors &c. v. Moyes.* 883

III. De son tort.

5. An executor *de son tort*, to whom administration is subsequently granted, may repudiate an agreement made by him to surrender a term for years vested in the intestate. *Doe d. Hornby v. Glens.* 837

IV. Assent to Legacy.

6. Where A., the legatee of a term, enters and occupies for a short time, and then quits the possession, it is a question for the jury, whether the executors have, or have not assented to the legacy; and if a party contract with A. for an underlease, it may be left to the jury to say, whether the contract was made with A. in his own right, or as agent to the executors. *Richardson v. Gifford.* 325

EXTENT, 322, n.

EXTRA COSTS.

See JUSTICES, 6.

FEIGNED ISSUE.

See EVIDENCE, 7, 8, 12.

FELONY.

And see ERROR, 8—JUSTICES, 1.—
MALICIOUS ARREST.

I. Arrest.

1. A private person cannot apprehend another, upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief. *Hall v. Booth.* 316

FIAT.

See PRACTICE, 5.

FIERI FACIAS.

See DISTRESS, 2.

FINAL JUDGMENT.

1. Where costs are taxed upon a judgment, such taxation is to be considered as the period at which final judgment is pronounced, *semble. Batten v. Slade.* 717

FINAL PORT.

See INSURANCE.

FINE.

1. The Court refused to set aside an award, on the ground that the decision of the arbitrator purported to be founded upon a title derived through a fine with proclamations, where the first proclamation had been made *before* the engrossment of the fine. *Doe d. Fleming v. Ford.* 813

FORBEARANCE.

See ASSUMPSIT, 1.

FORCIBLE DETAINER.

See CONVICTION.

FREEHOLD.

See EJECTMENT, 1.

FRAUD.

And see BANKRUPT, 2, 4—BEER, 1—
BILLS AND NOTES, 4, 6, 7, 8—
INSOLVENT DEBTOR, 3—NEW
TRIAL, 2.

1. If a vendee, after discovering the sale to be fraudulent, deals with the property as his own, he cannot recover the purchase-money, upon subsequently detecting further cir-

cumstances of the same fraud. *Campbell v. Fleeming and Jones.*

834

2. Whether a post-nuptial settlement made by a husband, at the instance of the friends of the wife, who at the time of her marriage had been entitled to legacies then in the hands of executors, and one of which continued to be so at the time of the settlement, is a fraudulent conveyance within 27 *Eliz. c. 6*, so as to be void as against creditors and purchasers for value, *quære. Doe d. Sweetland v. Webber.* 586

FRAUDS, STATUTE OF.

And see VENDOR AND PURCHASER.

I. Parol Demise. (Sect. 1.)

See LEASE, 2.

II. Special Promise to answer for another's Default. (Sect. 4.)

And see GUARANTEE, 1.

1. "As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date, 14th January, 1833." Held, that no action lies on this undertaking, inasmuch as no consideration appears upon the face of the instrument. *James v. Williams.* 196
2. "You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount together with the memorandum of my son's,—making in the whole 45*l.*" Held, in an action on this guarantee, first, that the memorandum referred to need not be produced;—*Shortrede v. Cheek.* 866
3. Secondly, that a sufficient consideration appeared upon the face of the guarantee;—*Ibid.*
4. Thirdly, that the plaintiff was entitled to recover for the whole 45*l.*

upon producing a promissory note, made by the defendant's son, for the payment of 35*l.*, and proving that he had withdrawn it, there being no evidence of any other note, drawn by either the defendant or his son, having been at the time of writing the letter, in the possession of the plaintiff. 866

FRAUDULENT ASSIGNMENT.

See BANKRUPT.

FRAUDULENT CONVEY- ANCE.

See EVIDENCE, 26—FRAUD, 2.

FREE WARREN.

1. Free warren cannot be parcel of a manor; *Morris v. Dimes*. 671
2. Free warren, therefore, will not pass by a grant of a manor, without the appurtenances; though it be held with the manor. *Ibid.*
3. Free warren can appertain to a manor only by prescription. *Ibid.*
4. Free warren in gross, of which a grantor is seised, will not pass by a grant of a manor and the appurtenances. *Ibid.*
5. Nor by a grant of a manor, and all right of fishing, fowling, hawking, hunting, and shooting, royalties, franchises, hereditaments, and appurtenances, belonging to or in anywise appertaining to the manor, or such as were in and by the deed of grant or letters-patent granted and assured by the crown as appurtenant to the manor or lordship, or any part thereof. *Ibid.*

FUNERAL EXPENSES.

1. An executor, who gives no orders, is liable only to the extent of the expenses of a funeral suitable to

the rank and circumstances of the testator. *Brice v. Wilson*. 512

2. And it seems that he is not liable at all, where the funeral is ordered by and on the credit of another person. *Ibid.*

GIFT.

See BILLS AND NOTES, 1.

GOODS.

I. *Change of Property in.*

See 224, n.

II. *Goods sold.*

See OVERSEER, 6, 8.

GRANT.

See COPYHOLD, 2, 3, 6, 7, 10, 11, 12—

FREE WARREN—PLEADING, 6—
LICENCE, 2.

GROWING CORN.

See DISTRESS, 2.

GUARANTEE.

And see EVIDENCE.

1. Where a contract, by which *A.* guaranteed to *B.* the amount of a debt to be contracted with *B.* by *C.*, was described in pleading as a promise to pay the debt to be so contracted, the Court sanctioned an amendment, ordered *ex nunc prius*, by substituting "guarantee" for "pay." *Hanbury v. Ella*. 438
2. "As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date, 14th January, 1833." Held, that no action lies on this undertaking, inasmuch as no consideration appears upon the face of the instrument. *Woods v. Williams*. 196

HAY.—Perception of the title of corn, is evidence of title to other rectorial titles, as may be seen in *Bayley v. Drever*. 885

HERIOTS.

See **COPYHOLD**, 12.

HIGHWAY.

And see **PLEADING**, 6—**TURNPIKE**.

Way-wardens.

1. Under 13 Geo. 3, c. 78, (the general highway act) a way-warden may charge in his account, law expenses incurred in the discharge of his duty, though not incurred on the occasions specified in the 65th section of the act. *Rex v. Marshal Foster and others*. 826
2. Law expenses incurred in resisting a rule for a certiorari to remove the allowance by a justice, of the accounts of preceding way-wardens, are expenses which a way-warden may insert in his account, and which the justices may allow, if they think proper. *Ibid.*
3. All expenses, bona fide incurred by a way-warden, in the execution of the duties imposed upon him by the highway act, may be inserted in his account, and may be allowed or disallowed by the justices, in their discretion. *Ibid.*

HIRING AND SERVICE.

See **SETTLEMENT**, III.

HORSE.

See **CONTRACT**, 6—**INNKEEPER**.

HOUSE.

See **BANKRUPT**, 5, 6, 7—**COMPENSATION**, 1—**CONTRACT**, 8—**NEGLECTANCE**.

HUNGERFORD MARKET.

See **COMPENSATION**, 1.

INDEMNITY.

See **ACTION**, 5—**GARANTEE**.

Stamp.

INDICTMENT.

See **COSTS**, 5—**PLEADING**, 8, 9—**STATUTE**.

INFANT.

I. Where bound. See 157, n.

INFERIOR COURT.

See **COSTS**, 6—**ERROR**, 1, 2, 3, 4, 6—**NEW TRIAL**.

INFORMATION.

See **JUSTICES**, 2.

INHABITANCY.

See **BANKRUPT**, 6.

INN OF CHANCERY.

1. A mandamus does not lie to compel a party, who has been elected principal of an Inn of Chancery, to attend before the Benchers of the Inn of Court to which such Inn of Chancery is attached, for the purpose of enabling such Benchers to decide upon the validity of his election,—unless it be shown that the Benchers of such Inn of Court have on some former occasion exercised such jurisdiction *in invitum*. *Rex v. Allen, Gent.* one &c. 184

INNKEEPER.

I. Liability.

1. A., on a fair-day, coming to an inn kept by B. with a horse and gig, orders B.'s servant to put the horse into the stable, but gives no special direction as to the gig. The horse is put into the stable, and the gig is placed with other carriages, in the public highway near the house, where it is the practice of B. to put carriages on fair days.

The gig is stolen. *B.* is answerable for the loss. *Jones v. Tyler.*

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2. Where a guest arrives at an inn with a horse and gig, and gives directions to the ostler to take his horse in, but says nothing about the gig, a promise to take the gig into the inn may be implied. *Ibid.*

INSOLVENT DEBTOR.

And see OUTLAWRY.

I. What passes to the Assignee.

1. Upon the assignment of a simple contract debt, the assignor must be considered as having the order and disposition of the debt with the consent of the true owner, until the debtor has notice of the assignment. *Buck v. Lee.*

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II. Remedies of Assignee.

2. The sequestration given to the assignee of a beneficed clergyman by sect. 27 of 7 Geo. 4, c. 57, and for the granting of which the order of adjudication is to be a sufficient warrant, does not relate back to the time of the assignment to the provisional assignee, so as to entitle such assignee to be satisfied before judgment creditors who have obtained sequestrations in the interim. *Bishop v. Hatch—Chuter v. Same.*

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And see PRACTICE, 2.

III. Voluntary Preference.

3. *Scoble*, that the 32d sect. of 7 Geo. 4, c. 57, as to voluntary preferences, does not render a judgment void as against the creditors, unless obtained by collusion with the insolvent. *Thorpe v. Eyre.*

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INSURANCE.

I. Insurable Interest.

1. The profits of a business are insurable; but they must be insured *qua* profits. *In the matter of arbi-*

tration between the Sun Fire Office Company and Wright.

819

II. Subject-matter, how described.

2. A party cannot, under an insurance of his interest in the Ship Inn and Offices, recover compensation for the loss of his business as an innkeeper, in the interval between the fire and the rebuilding. *Ibid.*

III. Warranty.

3. A warranty to sail on or before a particular day, is not complied with by leaving the harbour on that day without having a sufficient crew on board, although the remainder of the crew are engaged and ready to sail. *Graham, Executor, v. Barras.*

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IV. Duration of Risk.

4. Upon an insurance from England to Barbadoes, and all or any of the West India colonies, to continue until the ship shall be arrived at her final port of discharge, the voyage terminates on the discharge of the outward cargo at any of the colonies. *Moore and another v. Taylor.*
5. The cargo having been landed at Barbadoes, except coals and bricks brought from England, serving as ballast, (though of greater weight than was requisite for that purpose,) but used in the West Indies also as merchandise, the ship is lost in Barbadoes while about to proceed to another colony with the bricks and coals, and with other articles loaded at Barbadoes. It is a question for the jury—whether, notwithstanding the remaining on board of the coals and bricks, the outward cargo had not been substantially discharged before the loss occurred. *Ibid.*

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INTEREST.

See INSURANCE, 1.

INTEREST, PAYMENT OF.

See OVERSEERS, 4.

IRREGULARITY.

See NEW TRIAL, 2.

ISSUE.

See EVIDENCE, 7, 8, 12.

JUDGMENT.

See EXECUTOR, 2—PRACTICE, 1, 2, 3,
6—INSOLVENT DEBTOR, 3.

JUDGMENT CREDITOR.

See INSOLVENT DEBTOR, 2—
PRACTICE, 1.

JUDGE.

I. At Chambers.

See AMENDMENT, 1, 2, 3—
PRACTICE, 5.

II. At Nisi Prius.

See AMENDMENT, 5, 6.

III. Judges' Notes.

1. An affidavit to contradict the statement of a judge as to what occurred at the trial before him, is inadmissible. *Rex v. Grant.* 106

JURISDICTION OF COURT.

See AMENDMENT—ATTORNEY—
PRACTICE.

1. The Court in banco will not control the discretion of a judge at nisi prius as to directing amendments of the record. *Doe d. Poole v. Errington.* 646

JURY.

See CERTIORARI.

JUSTICE.

See TROVER, 4.

JUSTICES.

And see CONVICTION—HIGHWAY—
MALICIOUS ARREST—RATE—
WARRANT OF COMMITMENT.

I. Jurisdiction.

1. *A.* is charged with a felony before three magistrates, who, upon hearing evidence, admit him to bail; and afterwards, upon additional evidence, commit him to gaol. *A.* is not entitled to a habeas corpus to be discharged out of custody. *Ex parte Allen.* 35

II. Liability.

2. A dispute having arisen concerning goods deposited by *A.* with *B.* as a security, *B.* obtains from *C.*, a police magistrate, a summons requiring *A.*'s appearance on a day named.—Upon the appearance before *C.*, *B.* makes oath to a written information that he believes the goods to have been illegally pawned or disposed of by *A.*—*C.* gives to the parties a further day; at which, after evidence being gone into, *C.* commits *A.* for re-examination, on a charge of suspicion of having unlawfully disposed of the goods of *B.*: Held, that the charge was not so made as to give the magistrate jurisdiction over the matter under the 8th section of the Pawnbrokers' Act (39 & 40 Geo. 3, c. 99). *Tate v. Chambers.* 523

3. Whether, in a case upon this statute, properly brought before a magistrate, the party may be committed for re-examination, *quære.* *Ibid.*

4. The Court will not issue a mandamus to magistrates to do an act subjecting them to an action of which the event may be doubtful. *Rex v. The Justices of Buckinghamshire.* 68

III. Double Costs.

5. The double costs given to magis-

trates by 31 JAC. 1, c. 12, s. 5, are those costs only which are recoverable in the ordinary course of law, doubled. *Thomas v. Saunders*.

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6. Therefore where, in false imprisonment against magistrates, within 21 Jac. 1, the plaintiff obtains an order for changing the venue for the purpose of securing an impartial trial, in which order he undertakes to pay to the defendants all the extra costs necessarily occasioned by such cause being tried in the county where the trial was ordered to be had, the defendants are not entitled to have such extra costs doubled. *Ibid.*

IV. Quarter Sessions.

And see QUARTER SESSIONS—SPECIAL CASE.

7. The Court will not grant a mandamus commanding the justices in sessions to try an appeal dismissed for want of notice of trial, where the sessions have granted a case upon the question—whether the appeal had been rightly dismissed—which case has been abandoned by the party applying for the mandamus. *Rex v. Justices of the West Riding of Yorkshire*. 757

LANDLORD AND TENANT.

See ARBITRAMENT, 6—DEFAMATION, 2—ESTOPPEL—LEASE—NUISANCE—SURRENDER.

LEASE.

And see ESTOPPEL—SETTLEMENT, IV.

I. What amounts to.

1. A memorandum of an agreement to let, which contains words of present demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provides for the preparation of a future lease. *Warman v. Faithful*. 137
2. If, under a parol demise for more

than three years, void by the statute of frauds, the lessee enters and becomes tenant from year to year, he is bound by an undertaking to repair, obtained in such void demise. *Richardson and another, executors of Richardson v. Gifford*.

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3. Where A., the legatee of a term, enters and occupies for a short time, and then quits the possession, it is a question for the jury, whether the executrix have or have not assented to the legacy, and if a party contract with A. for an underlease, it may be left to the jury to say, whether the contract was made with A. in his own right, or as agent to the executor. *Ibid.*

II. How determined.

See ARBITRAMENT, 6.

III. Assignment of the Reversion.

4. A., having mortgaged to B., demises to C., reserving a power of re-entry, and afterwards mortgages to D. all his interest. G. may set up the title of D. as an answer to an ejectment brought by A. under the clause for re-entry. *Doe v. Marriott v. Edwards*. 193

LEGACY.

See LEASE, 2.

LETTER.

See EVIDENCE, 13, 14.

LEVARI FACIAS.

See ANNUITY—SEQUESTRATION.

LIBEL.

See CRIMINAL INFORMATION—DEFAMATION.

LICENCE.

I. What shall amount to a Licence.

1. A., the side of whose house joined

A.'s land, wrote to *B.* as follows: "Before the last coat of paint is put on the side wall, we wish to place a window in it, and our workmen say it can be finished off more neatly with your permission to place the necessary ladder, &c. The motive for doing this, is, that it should gain a more cheerful view of the common, and passing objects." *B.* replied, "You are welcome to place a ladder in my grounds." Held, that this did not amount to a licence by *B.* to *A.* to open a window in the side of *A.*'s house, and therefore that *A.* might obstruct the window by an erection on his own land. *Bridges v. Blamhard*, 100 Me. 691.

II. How created.

2. Whether such a right can be conveyed by parol licence, or whether it is an easement which lies in grant, *quære*. *Ibid.*

III. When revocable.

3. Whether a parol licence to have the light and air come unobstructed from *A.*'s land to a window to be opened in *B.*'s house, which adjoins *A.*'s land, can be revoked after the window has been opened. *quære*. *Ibid.*

LIGHT AND AIR.

See *LICENCE*.

LIMITATION.

I. Of Action.

See ENCLOSURE—EVIDENCE, 23—
OVERSEERS, 4, 5—PLEADING, 5—
TROVER—WITNESS, 4.

II. Of Estate.

See *BANKRUPT*, 5.

LOCAL ACT.

See COMPENSATION—STATUTE—
TURNPIKE—VESTRY.

MAGISTRATES.

See *JUSTICES*.

MALICE.

See *DEFAMATION*.

MALICIOUS ARREST.

I. Evidence.

1. In an action for a malicious arrest on a charge of felony, it is not necessary for the plaintiff to give in evidence the whole of the proceedings before the magistrates. *Biggs v. Clay*, 100 Me. 694.

MANDAMUS. VI

And see *CERTIORARI*—*JUSTICES*.

I. Where it lies.

1. The Court will not grant a mandamus to churchwardens to compel them to assemble the parishioners, for the purpose of taking a poll upon a motion to do an illegal act, which had been carried by a show of hands at a vestry meeting. *Res v. The Churchwardens of St. Saviour's, Southwark*, 878.
2. The adjudication of the quarter sessions, upon an appeal relating to an act done in pursuance of a local turnpike act, is final, and a mandamus will not lie to require that court to re-hear such appeal. *Res v. The Justices of the West Riding of Yorkshire*, 86.

II. Return.

3. Upon an insufficient return to a mandamus, the Court will not, at the request of the defendant, instead of awarding a peremptory mandamus, direct the prosecutor to demur to the return. *Res v. The Lord of the Manor of Oundle*, 496.
4. *Semble*, that a prosecutor could not so demur. *Ibid.*

MANOR.

See COPYRIGHT—EVIDENCE, 21—
FREE WARREN.

MARRIAGE.

See CONSPIRACY, 1, 2, 3—
EVIDENCE, 27.

MASTER AND SERVANT.

See SETTLEMENT, III.

MEDICINE.**I. Physician.**

1. A person created a doctor of medicine by a Scotch university, cannot practise as a physician in England, unless licensed by the College of Physicians. *Collins v. Carnegie.* 703
2. More especially where the degree is granted without residence. *Ibid.*
3. A person, being previously a stranger to the place, goes to a town which is the seat of a university, and is told that a certain building is the College, that a certain person whom he sees in it is the librarian; and this person shews him a seal in his custody, which he states to be the seal of the University, and produces a book, which he states to be the book of acts (statute book) of the University; and such person compares such seal with the seal upon a diploma, the genuineness of which is in question, and makes a copy (which is duly examined) from such book of acts of an entry of an act conferring the degree of M. D.: Held, that the diploma is sufficiently authenticated, and the act conferring the degree properly proved. *Ibid.*
4. In an action of slander, for words, spoken of the plaintiff as a physician, which import a denial that he is duly qualified to practise as a

physician, the plaintiff must, under the general issue, prove the indorsement in the declaration, alleging that the plaintiff had exercised the profession of and was a physician, and show not only that he practised as a physician, but also, that he practised lawfully. 703

MILITIA-MAN.

See SETTLEMENT 9.

MINOR.

1. A. having accepted a bill of exchange during his minority, when of age A. directs B. to pay the amount out of funds in B.'s hands. This contract need not be declared on specially. *Hunt v. Massey.* 109

MISDEMEANOR.

See ERROR.

MISJOINDER.

See EJECTMENT.

MORTGAGE.

And see TROVER, 1.

1. A., having mortgaged to B., demises to C., reserving a power of re-entry, and afterwards mortgages to D. all his interest. C. may set up the title of D. as an answer to an ejectment brought by A. under the clause for re-entry. *Doe d. Marriott v. Edwards and others.* 193

NEGLIGENCE.

And see BILLS AND NOTES.

1. An action lies against a party who, by carelessness or negligence in excavating his own grounds, either causes or accelerates the fall of an adjoining house. *Dodd v. Holme.* 739

NEW ASSIGNMENT.

See ARBITRAMENT—PLEADING.

NEW TRIAL.

I. When granted.

1. Where evidence is rejected which is tendered for one purpose, in respect of which it is inadmissible, but is admissible in another view of the case, not alluded to at the trial, the Court will not grant a new trial as upon an improper rejection of evidence. *Res v. Grant.* 106

II. By whom grantable.

2. An inferior court cannot grant a new trial, except on the ground of fraud or irregularity in obtaining the verdict. *Res v. Mayor of Oxford.* 877

III. Judges' Notes.

3. The Court will not entertain a motion for a new trial in an action tried before an under-sheriff, unless the under-sheriff's notes, verified by affidavit, are in Court. *Burney v. Maxall.* 472, n.

NEWS-ROOM.

See RATE.

NIL DICIT, JUDGMENT BY.

See ARBITRAMENT, 5.

NON CONCESSIT.

See PLEADING, 6, 7.

NON DEDIT, 45, n.

NON DIMISIT, 45, n.

NON EST FACTUM.

See PLEADING, 7.

NON FEOFFAVIT.

See PLEADING, 7.

NON-JOINDER.

See ABATEMENT OF SUIT.

NOTICE.

See BILLS AND NOTES, III.—COSTS, 10, 11—ENCLOSURE—JUSTICES—QUARTER SESSIONS—SUMMONS.

NUISANCE.

And see PLEADING, 9.

I. Liability of Landlord for Nuisance on demised Premises.

1. A person who lets premises with a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance. *Res v. Pedley.* 627
2. But a landlord is not liable in respect of a new nuisance, created by his tenant during the term. *Ibid.*

3. A party who lets premises, the natural consequence of the regular user of which, is, that they will become a nuisance unless properly attended to, is liable if they afterwards become a nuisance by such regular user. *Ibid.*

4. The landlord ought in such case, either to stipulate with his tenants that they will do that which is necessary to prevent the premises from becoming a nuisance, or to reserve to himself the power of entering for the purpose. *Ibid.*

NULLA BONA.

See EVIDENCE, 9.

OATH.

See VESTRY.

ORDER OF REMOVAL.

And see APPEAL—SETTLEMENT.

1. The parish of Bishop-Wearmouth consists of seven townships, separately maintaining their poor. One is called Bishop-Wearmouth, and another Bishop-Wearmouth-Panns.

A pauper, whose settlement was in B. W. P., was removed to the parish of B. W. The pauper was taken with the order, and delivered to the overseer of the township of B. W. P., who objected to take him unless a demand for expenses was waived. This was refused, and the pauper was taken away. Subsequently a churchwarden of the parish of B. W. was served with the order, and the pauper was delivered to him. He carried the pauper to the workhouse of the township of B. W., where the pauper remained. Held—First, that service on the churchwarden of the parish of B. W. was insufficient, being service upon a mere stranger.

Rex v. Inhabitants of the township of Bishop-Wearmouth. 77

2. Secondly, that the sessions should have quashed the order. 77

3. Thirdly, by *Dennis, C. J.*, and *Littledale, J.*—*dubitantibus Tanton, J. and Patteson, J.*—that the inhabitants of the township of B. W. might appeal against this order, although they were not bound to maintain the pauper under it. 77

4. *Semble*, that the order could not be amended by substituting the word "township" for "parish." 77

OUTLAWRY.

I. Reversal of.

The Court will not reverse an outlawry on the ground that the defendant has taken the benefit of the Insolvent Debtors' Act, and that the debt was inserted in his schedule. *Dickson v. Baker.* 775

OVERSEER.

I. Liability.

1. In an action against *A., B., C., D.*, and *E.*, as churchwardens and overseers for goods furnished to the poor by their joint orders, it is sufficient for the plaintiff to prove

that all the defendants, *jointly* as churchwardens and overseers, and signed orders for the delivery of the articles furnished, although *E.* was only an assistant overseer. *Kirby v. Bannister and others.* 119

2. Money advanced to the poor by the direction of an overseer, may be recovered as money lent to such overseer. *Ibid.*

3. *A., B., C. and D.* sign a promissory note, by which they promise, "as churchwardens and overseers," to pay *E.* or order, a sum of money with interest; which sum was in fact the amount of a loan made by *E.* for the use of the parish. *A., B., C. and D.* are personally liable upon such note. *Creech v. Pitt and others.* 456

4. The payment of interest on such note, by the testator, is a sufficient acknowledgment of the debt to take the case out of the statute of limitations. *Ibid.*

5. More especially where *B.* has audited the parish accounts, in which payments of interest on the note were entered. *Ibid.*

6. Whether the ordering of goods, by one overseer, for the use of the parish, creates a contract binding upon a co-overseer, is a question of fact, depending on the particular circumstances of each case. *Enders v. Titchmarsh and Wallis.* 712

II. Prohibition of supplying Goods to Poor.

7. The prohibition in 55 Geo. 3, c. 137, s. 6, of the supplying of goods, materials, or provisions, for the use of any workhouse, or otherwise for the support and maintenance of the poor, by churchwardens or overseers, does not extend to materials supplied for the repair of the workhouse. *Barber v. Waite.* 811

8. The prohibition applies only to the case of goods, &c. supplied to the poor people. *Ibid.*

9. The section does not apply to contracts for work and labour, but only to cases where the action would be for goods sold and delivered, *semble*. 611

PANEL.

See **ERROR.**

PARISH.

See **CONSPIRACY—OVERSEERS—VESTRY.**

PARTNERS.

I. *Their Remedies against each other.*
 1. A recovers against B, C, and D, partners in trade, upon their joint contract, and takes in execution B, only, who thereupon pays the whole sum recovered. B cannot at law recover against his co-defendants for contribution. *Sadler v. Hickson*. 258
 2. His remedy is in equity, as in cases of a voluntary payment, by one partner, of a debt due from himself and his co-partners upon their joint contract. *Ibid.*

II. *Joint Liability.*

2. A and B, being partners, A retires, and B continues the business, having the partnership effects; C, a creditor, being told by B, that he must look for payment to him alone, draws a bill of exchange on B, for his debt. The bill is dishonoured, and C gives B, time to pay. These facts raise a question for the jury, whether there was not an agreement between B and C, that C should accept B as his sole debtor, and should take the bill from him alone by way of satisfaction for the debt due from both. *Thompson v. Percival and another*. 167
 Such an agreement, followed by the receipt of the bill from B, would be a good defence by way

of "acceptance and satisfaction" in an action by C against A and B jointly. 167

PAUPERS.

See **OVERSEERS—SETTLEMENT.**

PAWNBROKERS.

See **JUSTICES.**

PERAMBULATION.

See **EVIDENCE.**

PHYSICIAN.

See **MEDICINE.**

PLEADING.

And see **AMENDMENT—ERROR—RATE—STATUTE.**

I. *Declaration.*

1. A., during his minority, accepts a bill of exchange, and when of age directs B. to pay the amount out of funds in B.'s hands. This contract need not be declared on specially. *Hunt v. Massey*. 109

II. *Replication.*

2. In an action upon a bill of exchange by B. indorsee, against C. acceptor, C. pleads that the acceptance was obtained from him without consideration and by the fraud of A. the drawer, and was indorsed to B. without consideration, and with notice of the fraud and of the want of consideration as between A. and C. *Semble*, that B. may reply merely traversing the fraud. *Heydon v. Thompson*. 319
 3. If, however, B. newly assigns a different bill, accepted generally, and the defendant pleads as before, omitting the statement of the original want of consideration, a replication to such plea, merely traversing the fraud is sufficient.

Ibid.

4. The circumstances of fraud, stated in the plea, being that the defendant wrote his name and a qualified acceptance on blank stamped paper, and delivered it to the drawer for the purpose of his drawing thereon a bill at nine months, but that the drawer drew upon such paper a bill at six months: The Court held that a replication merely denying that the defendant wrote his name and a qualified acceptance on blank stamped paper in manner and form &c. sufficiently put in issue the whole fraud.

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III. What shall be said to be in issue.

And see 2, 3, 4, *supra*.

5. Plea, set-off upon the plaintiff's promissory note payable to the order of A., and indorsed to the defendant by the administrator of A. Replication, that the cause of set-off did not accrue to the defendant within six years. The making of the note, the grant of administration, and the indorsement, are admitted, and the defendant has merely to show an acknowledgment within six years. *Gale v. Capron*. 863
6. Whether, upon a traverse of a grant by deed, alleged to have been made by a subject seised in fee under a derivative title which is set out and not traversed, the title of the grantor can be questioned, as in the case of the king granting by matter of record out of an alleged original seisin, *quære*. *Morris v. Dimes*. 671
7. Distinction between a traverse by strangers of the operation of a deed by plea of non seoffavit &c., and a traverse by parties or privies of the making of the deed by plea of non est factum. 50 n.

IV. Words of Reference.

8. Words of reference as "there" and "said," in an indictment, will

not be referred to the last antecedent, where the sense requires that they should be referred to some prior antecedent.

9. Thus, where in an indictment for a nuisance, it was alleged, that the defendant, at the township of W., encroached upon a highway there, (i. e. at the township of W.) leading from a highway in the said township, leading from the village of W. towards C. to another highway in the said township, from the village of W. to the township of X. by a certain wall there extending into the said highway, and erected by the defendant: It was held, that the words "there" and "the said" must refer to the township of W. and the highway there, and not to the township of X., or to the highway leading from the village of W. to the township of X. *Wright v. The King*, (in error). 892

PLENE ADMINISTRAVIT.

See ASSETS—PRACTICE, 9.

POLICY.

See INSURANCE.

POOR.

See ACTION—OVERSEERS—SETTLEMENT.

POLLING.

See MANDAMUS, 1.

POOR-RATE.

See RATE.

POST-NUPTIAL SETTLEMENT.

See EVIDENCE.

POWER.

And see CONFESSION.

1. A. settles Blackacre to certain

uses, reserving to himself a power of appointment by will. By his will he devises "all his real estate whatsoever and wheresoever, in possession, reversion, remainder or expectancy." He then devises his leasehold and personal estate, "and all other his real and personal estate, whatsoever and wheresoever." At the time of making his will and also at his death, A. was seised of Whiteacre in reversion of a term of five hundred years, and of Blackacre in possession. Held, that the will did not operate as an execution of the power. *Davies v. Merry Williams and others.* 821

PRACTICE.

And see AMENDMENT—COSTS—FINE
—NEW TRIAL—PARTNERS.

I. Execution.

1. The sequestration given to the assignees of an insolvent benefited clergyman by sect. 27 of 7 Geo. 4, c. 57, and for the granting of which the order of adjudication is to be a sufficient warrant, does not relate back to the time of the assignment to the provisional assignee, so as to entitle such assignee to be satisfied before judgment creditors who have obtained sequestrations in the interim. *Bishop v. Hatch, clerk—Chuter v. Same.* 498
2. The 34th sect. of 7 Geo. 4, c. 57, which invalidates certain executions issued subsequently to the imprisonment of an insolvent upon a judgment on a warrant of attorney or *cognovit actionem*, does not extend to a sequestration granted in pursuance of a writ of *sequestrari facias* issued upon such a judgment. *Ibid.*
3. Whether the bishop must of necessity be made a party to a rule nisi to set aside a sequestration so granted by him *quære*: *Ibid.*

distinction of the writ of sequestration

II. Service of Rule.

4. To ground a motion for a contempt in disobeying a rule of Court, it is not sufficient to have shewn to the party the original rule, without personal service of a copy of such rule. *Parker v. Burgess.* 36

III. Certiorari.

5. Held, that a judge's order or fiat for a certiorari to issue in vacation, can only be granted *nisi*. *Rex v. Inhabitants of Chipping Sodbury.* 104

IV. Docket.

6. The Court has no power to alter the docket of an issue, by adding the amount of damages and costs, for the purpose of making it a docket of the judgment as of the term when judgment was recovered, pursuant to 4 & 5 W. & M. c. 20;—although by that act the duty of docketing judgments is imposed upon an officer of the Court, and it appeared that the practice had long been to docket the issue only, before the trial, the judgment-roll being afterwards referred to by adding its term and number, and that no book for the docketing of judgments was kept by the officer. *Hopwood v. Wallis.* 146

V. Judges' Notes.

7. An affidavit to contradict the statement of a judge as to what occurred at the trial before him, is inadmissible. *Rex v. Grant and others.* 106

And see NEW TRIAL, III.

VI. New Trial.

8. Whether upon showing cause against a rule for a new trial, where the rule nisi was obtained upon the ground of the improper reception of evidence to show insolvency, preparatory to proof of another act of bankruptcy, in which the parties failed at the trial, it is

competent to the Court to entertain a question as to whether a deed amounted to an act of bankruptcy. *Quare. Botcherley and another, Assignees, &c. v. Lancaster.* 383

VII. Uniformity of Process Act.

9. Plene administravit, and no assets at the time of the exhibiting of the bill, pleaded after the 2 W. 4, c. 39, was held after verdict to refer to the commencement of the suit. *Rees, Gent. &c. v. Morgan, Executrix.* 205

PRESENTMENT OF GRANT.

See COPYHOLD, 8, 9.

PRIVILEGED COMMUNICATION.

See DEFAMATION, 2.

PRIVITY OF ESTATE.

See DISTRESS, 1—EVIDENCE, 20—PLEADING, 7.

1. *A.*, being possessed of Blackacre and Whiteacre by the same title, conveys Blackacre to *B.* Evidence given by witnesses, since dead, in an action, between *C.* and *A.* respecting the title to Whiteacre, brought subsequently to the conveyance from *A.* to *B.*, is not admissible in an action between *C.* and *B.* as to the title to Blackacre. *Doe d. T. Foster v. Earl of Derby.* 782

2. Where two ejectments, depending upon the same title, are brought by *A.* against *B.* and against *C.* respectively, at the same time, and come on for trial on the same day, and that of *Doe d. A. v. B.* having been decided against *B.*, *C.*'s counsel consents that a verdict shall pass against him in *Doe d. A. v. C.*, on the ground that the evidence is the same in both cases; the evidence given in *Doe d. A. v. B.* cannot

be admitted on behalf of *A.* in an action subsequently brought, respecting the same title, by *C.* against *A.*, unless *A.* proves clearly that it was agreed between himself and *C.*, on the former occasion, that the evidence given in *Doe d. A. v. B.* should be considered as repeated in the action of *Doe d. A. v. C.* 782

PROCESS.

I. Variance.

1. A defendant, taken upon a *capias ad respondendum*, is entitled to be discharged, if, between the writ and the copy served upon him, there is a variance either in the sound or in the sense of the words. *Hodgkinson v. Hodgkinson.* 564
2. As where, in a *capias*, the address was to the Sheriffs of *Middlesex* and in the copy to the Sheriffs of *Middlesex.* *Ibid.*
3. The Court will not amend a defective writ of *capias.* *Ibid.*

PROCLAMATIONS.

See VENDOR AND PURCHASER, 5.

PROCTOR.

See ECCLESIASTICAL COURT.

PROFITS.

See INSURANCE, 1, 2.

PROMISE.

See ASSUMPSIT, 1—EVIDENCE, 1.

QUARE IMPEDIT.

See AMENDMENT.

QUARTER SESSIONS.

See JUSTICES, IV.—SPECIAL CASE—WITNESS.

I. Practice.

1. The Court of Quarter Sessions has no authority to make a rule

of court, requiring one calendar month's notice of the entry and respite of an appeal against an order of removal, in addition to the notice of appeal required by 9 Geo. 1. c. 7, s. 8. And if an appeal be dismissed for want of such notice, the sessions may be required by mandamus to hear it. *Rex v. Justices of Norfolk.* 55

2. The Court of Quarter Sessions, in a case sent by them for the opinion of the Court of K. B., should state the conclusions of fact which they draw from the evidence and not the evidence itself. *Rex v. Inhabitants of St. Cuthbert, Wells.* 100

II. Adjournment of Quarter Sessions.

3. A Court of Quarter Sessions cannot be adjourned by the crier in the absence of the Justices. *Rex v. Justices of Middlesex.* 110

4. Where a party has been tried at a Court of Quarter Sessions, which has previously lapsed for want of due adjournment, he has a right to have a record of the proceedings made up by the clerk of the peace, although the object of the application is to enable him to support a plea of *autrefois* convict. *Ibid.*

RATE.

And see ENCLOSURE ACT.

I. What Property ratable.

1. An act, incorporating certain persons for the purpose of erecting an exchange in L., directs that the company shall provide two rooms, to be used as public rooms, for the purpose of transacting such commercial business as the company shall think proper, such rooms to be provided out of the yearly profits of the undertaking with such articles as the company shall direct—to be open to the proprietors—and not to be alienable. The company make and furnish a news-room, which they provide with

newspapers, &c., in which public notice is given of commercial and nautical information, by a servant of the company employed to collect it; and to which non-proprietors are admitted upon payment of a certain sum annually. Stock in trade, profits and other personal property, are not ratable in it, but property is there rated according to its fair annual value to let. Held, that the company are ratable for the room at its annual value to let, with reference not only to its situation, size and accommodation as a news-room, but also to its attendant revenue from the annual subscriptions. *Rex v. Liverpool Exchange Company.* 550

2. But they are not ratable in respect of the value of the privileges of the proprietors in being permitted to attend free of charge, although, by a regulation of the company, proprietors not attending are entitled to receive the same sum, in respect of their shares, that is paid by ordinary subscribers. *Ibid.*

3. Any advantages attendant upon a building, which would enable the owner to let it at a higher rent, may be taken into the account in estimating its ratable value. *Ibid.*

4. Whether the owner of a farm, composed partly of grass land, who, upon the determination of a lease, takes possession of the farm by a servant, who occupies it for the purpose of protection, but without dealing with the land, is ratable to the poor as a party beneficially occupying, *quære.* *Rex v. Justices of Bucks.* 68

II. Mode of Assessing.

5. Tithes, for which compositions have been entered into by the respective occupiers, may be rated in the hands of the tithingman in one entire sum. *Rex v. Justices of Sussex.* *And see* 263

6. Upon the refusal of a proprietor to

pay such rate, the justices are bound, upon the application of the overseers, to issue their warrant for levying it; although such mode of rating be inconvenient to the rector, and contrary to former practice. *Ibid.*

III. *Remedy of Party illegally rated.*

7. A party rated to the poor in respect of property not in his occupation, is not bound to *appeal*, but may *replevy* any distress for such poor-rate. *The Governors of the Poor of Bristol v. Waite and others.*

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8. So, if *part* only of the premises included in the rate be occupied by him. *Ibid.*

9. But if one distress be taken under a warrant to levy the amount of a poor-rate, void by reason of such non-occupation, and also under a separate warrant to levy another *good* rate, the validity of such distress cannot be questioned in an action of trespass or replevin. *Ibid.*

10. Where, therefore, to an avowry for several poor-rates, the plaintiff pleaded in bar that one of the rates was in respect of property not occupied by him, a replication stating that such distress was made under several warrants for the several rates, was held to be good. *Ibid.*

11. If more goods are seized than would be a reasonable distress for the *good* rate, the remedy of the distreinee is *case* for an excessive distress. *Ibid.*

RECORD.

And see SUGGESTION.

1. A party, tried at a quarter sessions which has previously lapsed for want of due adjournment, has a right to have a record of the proceedings made up by the clerk of the peace, although the object of the application be to enable him to support a plea of *autrefois convict*. *Res v. Justices of Middlesex.* 110

REGISTERED OWNER, LIABILITY OF.

See SHIP.

RELATION.

See SEQUESTRATION.

RENT-CHARGE.

See DEMAND, II.—DISTRESS, I.

RENT.

See COPYHOLD—DISTRESS—ESTOPPEL—NUISANCE.

REPLEVIN.

And see RATE.

1. Where a replevin cause is removed into a superior court, the defendant may avow there for a different cause from that for which he avowed in the court below. 360 (a)

REPUTATION.

See EVIDENCE.

RESCISSION OF CONTRACT.

See FRAUD.

REVOCATION OF LICENCE.

See LICENCE.

RIENS PASSA PER LE FAIT, 51, n.

RISK.

See INSURANCE, IV.

ROLLS.

See COGNOVIT.

RULE OF COURT.

See EVIDENCE, 8—PRACTICE, II.—QUARTER SESSIONS.

SALARY.

See SETTLEMENT, III.

SAVINGS' BANK.

1. When deposits are made by a benefit society, of whom a part have since been expelled by magistrates, who had no authority to interpose, the managers of the bank are not compellable, upon the application of the members so illegally expelled, to appoint an arbitrator to settle disputes as between such managers and the depositors. *Rex v. Witham Savings' Bank.* 416
2. Nor in any case where deposits have been made on behalf of a society, are the managers compellable to appoint an arbitrator upon the application of individual members, not being the representatives of the whole or of a majority of such society. *Ibid.*
3. Magistrates have no authority, under 49 Geo. 3, c. 125, to make orders enforcing rules of a benefit society, which have not been duly enrolled. *Ibid.*
4. By the rules of a savings' bank, deposited with the clerk of the peace, pursuant to 57 Geo. 3, c. 13, s. 2, entries of deposits are to be made in a book kept by the bank for that purpose and in a duplicate account book to be kept by the party making the deposits, which duplicate is to be a voucher for the party producing it, and a receipt for the bank when handed over to them. *A.* deposited in the name of *B.*, and afterwards, without *B.*'s authority, received back the amount and delivered up the duplicate account book: Held, that *B.* still continued to be a depositor. *Rex v. Trustees and Managers of the Cheadle Savings' Bank.* 418
5. A party is not entitled to a mandamus to compel a savings' bank to refer to arbitration, under 9 Geo. 4, c. 92, s. 45, unless he shew himself to the Court to be at the time a depositor. *Ibid.*

SCOTCH DIPLOMA.

See MEDICINE.

SEQUESTRATION.

See ANNUITY, 4—PRACTICE, 2.

SETTLEMENT.

And see JUSTICES—ORDER OF REMOVAL—QUARTER SESSIONS.

I. By Apprenticeship.

And see post, 16.

1. *A.*, by indenture, executed by himself and the parish officers, is bound apprentice in husbandry, in respect of an estate rented by *B.* under *C.* *A.* never serves *B.*, (who is not shewn to be consuant of the binding,) but is taken by the overseers to *C.*, and serves him in his trade of a stocking-maker. *A.* gains no settlement by the service, either as under an original binding to *C.* or as under an assignment from *B.* to *C.* *Rex v. Inhabitants of St. Cuthbert's, Wells.* 100
2. A parish apprentice left his master and went to live with his father in another parish, working with his father in the same trade at which he had previously worked with his master. The master having claimed the apprentice, agreed with the father, in May, to deliver up the indenture upon payment of four guineas, in August. The apprentice continued with his father, working at the same trade, until August, when the indenture was delivered up and the money paid. Held, first, that there was no dissolution of the apprenticeship until August, (if then); Secondly, that the service by the apprentice with the father was referable to the indenture; Thirdly, that the apprentice gained a settlement in the parish in which he resided with his father. *Rex v. Inhabitants of Gwinear.* 297
3. Whether a parish apprentice under age, is capable of assenting to the cancellation of his indenture of apprenticeship, *quære.* 297

4. The premium for an apprenticeship was paid by the trustees of a charitable fund. On the day of the binding, the apprentice was provided with a suit of clothes by the parish officers, in contemplation of the binding, but without any express stipulation to that effect: Held, that this was not an expense within 56 *Geo. 3*, c. 139, s. 11, making requisite the assent of two justices to the indenture. *Rex v. Inhabitants of Quainton*. 289

II. By Estate.

5. A surrenderee gains a settlement by a residence of forty days, upon a copyhold to which he is afterwards admitted. *Rex v. Inhabitants of Thruscross*. 284
Semble, that the settlement is complete without the admittance. *Ibid*.

III. By Hiring and Service.

6. A hiring at so much per month is a hiring for a year. *Fawcett v. Cash*. 177
 7. A general hiring, in the absence of any custom to rebut the presumption, is to be presumed to have been a hiring for a year. *Ibid*.
 8. A clerk hired at 12*l.* 10*s.* per month for the first year, to advance 10*l.* per annum until the salary is 180*l.*, is hired for at least one year. *Ibid*.
 9. A settlement is gained by a private, who, whilst on the permanent staff of the local militia, is hired and serves for a year. *Rex v. Inhabitants of St. Marg, Colchester*. 113
 10. A contract by which a servant hires himself as a footman and groom, is not dissolved by a subsequent contract, by which he engages to bind himself to serve in a different character at higher wages, and in a foreign country, although the servant accompanies his master into such foreign country, the service performed abroad being the

same as that originally contracted for. *Rex v. Inhabitants of Buckingham*. 72

11. A servant, by accompanying his master into a foreign country during a portion of the year for which he had contracted to serve, (the service abroad being referable to the yearly hiring,) is not thereby disabled from acquiring a settlement by service in England. *Ibid*.
 12. A clerk hired generally by the year at a certain salary, may, upon a dissolution of the contract by mutual consent, within the year, recover salary pro rata, without any express agreement to that effect. *Thomas v. Williams*. 545
 13. The contracts of a trader with his clerks and servants, are not dissolved by his bankruptcy. Therefore the clerk of a trader, against whom a commission issues during a current year of the hiring of such clerk, may, after the bankrupt has obtained his certificate, recover his salary for the whole year. *Ibid*.
 14. So also, he may recover pro rata, where the contract has been dissolved by mutual consent within the year, but after the issuing of the commission. *Ibid*.
 15. The departure of the clerks upon the ceasing of the trade, is evidence of such a dissolution. *Ibid*.
 16. *A.* agreed with *B.*, a flannel manufacturer, for twelve months, to learn the art of weaving flannel, *A.* to receive one-half of what he earned, and find himself in meat, drink, and lodging, and *B.* to have the other half for teaching: Held, a defective contract of apprenticeship, and not a contract of hiring and service. *Rex v. Inhabitants of Newtown, Montgomeryshire*. 506
 16. *A.*, for two successive years, was hired by *B.* as a farm servant, from a few days after Michaelmas-day, until the Michaelmas-day following, at certain wages for the whole

time. A few days after the Michaelmas on which the second hiring expired, *B.* paid *A.* the wages agreed upon, and asked him if he chose to go on with him; to which *A.* replied "yes:" Held, that this conversation was not evidence of a yearly hiring, so that a service under it might be connected with the antecedent service. *Rex v. Inhabitants of Ardington.* 304

IV. By Renting a Tenement.

17. Between the passing of 59 Geo. 3, c. 50, and 6 Geo. 4, c. 59, *A.* rented for a year of *B.* a dwelling-house, and of *C.* a stable, at the respective rents of 8*l.* and 6*l.* 6*s.* both in the same parish, but unconnected. *A.* occupied and paid the year's rent for both: Held, that he gained a settlement by such occupation. *Rex v. Inhabitants of Gosforth.* 303
18. Under 6 Geo. 4, c. 57, a party gained a settlement who rented two dwelling houses in different parts of the same parish for a year, at yearly rents of less than 10*l.* each, but together exceeding that amount, although he only occupied one himself and underlet the other. *Rex v. Inhabitants of Wootton.* 312
19. The words "separate and distinct," in 59 Geo. 3, c. 50, 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, operate to exclude an occupation of one tenement jointly with another person, and not with another house, &c. *Ibid.*
20. No settlement can be gained since 1 Will. 4, c. 18, by renting a tenement in which rooms are underlet. *Rex v. St. Nicholas, Rochester.* 21
21. A settlement was gained under 6 Geo. 4, c. 57, by renting two distinct dwelling-houses, although only one were actually occupied by the party himself. *Rex v. Inhabitants of Iver.* 28
22. *A.* demises by deed to *B.* and *C.* jointly, at 16*l.* a-year. *B.* oc-

cupies and pays the rent and the rates. *Semble*, that evidence is inadmissible to shew that it was intended that *B.* should be sole tenant and that *C.* was merely a surety. *Rex v. Inhabitants of Great Wakering.* 47

23. *A.* lets a house for a year at 20*l.* to *B.* *B.* underlets for a year at the same rent to *C.*, who occupies during the whole year. In the middle of the year *B.* surrenders to *A.*, who accepts *C.* for his immediate tenant, upon a new demise from year to year from *A.* to *C.*; *C.* gains no settlement under 1 Will. 4, c. 18. *Rex v. Inhabitants of Banbury.* 292
24. *Semble*, that payment of rent by *A.*, the vendee of the goods of *B.*, to prevent a distress for rent due from *B.*, is a good payment of rent by *B.* within 1 Will. 4, c. 18. *Ibid.*

V. Emancipation.

25. In 1829, a daughter of full age hired herself, with the consent of her father, with whom, up to that time, she had lived, to a farmer, at weekly wages, to work for him during harvest. She remained with the farmer three weeks, and then returned to her father. In the following year the daughter hired herself again to the same farmer, to assist in the harvest, and the father received the wages from his daughter on her return. On both occasions, a returning home, as soon as the harvest should be over, was intended by the daughter and expected by the father: Held, that the daughter was emancipated, per *Denman, C.J., Taunton, J.* and *Patteson, J.*; dissentiente, *Littledale, J.* *Rex v. Inhabitants of Oulton.* 62
26. *Semble*, that where a child is of age, emancipation is to be *prima facie* presumed. *Ibid.*
27. *Secus*, where the child is under age. *Ibid.*

SHERIFF.

See ARREST, 3—EVIDENCE, 9, 10—
UNDER-SHERIFF.

SHERIFF'S OFFICER.

See EVIDENCE, 10.

SHIP.

And see INSURANCE.

I. Liability of Owners.

1. The registered owner is not liable for articles furnished, without his order, for the repair of a vessel chartered for a year, to a party who has undertaken to repair the ship during that term. *Roe v. Davis and others.* 873
2. Nor where there is no charter-party, unless the goods were ordered by the agent of the owner, or were beneficial to him. *Ibid.*
3. The registered owners of a steamboat let it to A., the captain, for one year, the boat to be repaired by A., the engine by the owners, who were to appoint an engineer: Held, that the owners were not liable for repairs unconnected with the engine, ordered by A. *Ibid.*

SHIP'S REGISTRY.

See CONVICTION.

SHORT-HAND-WRITER'S NOTES.

See EVIDENCE, 8.

SIMONY.

See AMENDMENT, 2, 3.

SINGLE BILL, 157, n.**SLANDER.**

See DEFAMATION.

SPECIAL CASE.

And see JUSTICES.

1. The Court of Quarter Sessions, in a case sent by them for the opi-

nion of the Court of K. B., should state the conclusions of fact which they draw from the evidence, and not the evidence itself. *Rex v. Inhabitants of St. Cuthbert's, Wells.*

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2. A case sent back to the sessions to be re-stated, must be heard de novo, as upon a new trial; and if a contrary conclusion is come to, they may make a new order accordingly. *Rex v. Bloxam.* 385

SPECIAL DAMAGE.

See DEFAMATION.

STAMP.**I. Agreements.**

1. An agreement to indemnify A. from all costs, charges, damages, or other expenses, which he may incur as bail for B., requires an agreement stamp under 55 Geo. 3, c. 184, the arrest of B., and consequently the liability of A., being for more than 20L., though the costs &c. incurred do not amount to that sum. *Wrigley v. Smith, the elder.* 181

II. Deeds.

2. Where a deed is produced bearing the proper stamp, the Court will receive it in evidence, without entering into the question whether it was affixed upon the payment of a sufficient penalty, and within proper time, although it is proved not to have been stamped when executed. *Rex v. Inhabitants of Preston.* 31
3. But with reference to the effect of the deed, the Court will inquire into the time when it was stamped, in cases where stamping within a limited period is required by statute. *Ibid.*

III. Post-Stamping.

And see 2, 3, *supra*.

4. A memorandum indorsed upon an

instrument, purporting to be an acknowledgment by the commissioners of stamps of the payment of a penalty, is not evidence. *Ibid.*

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE.

And see CERTIORARI—CONTRACT—
OVERSEER—RATE.

I. How described.

1. Where an indictment for a conspiracy to lay an information for an offence prohibited by a certain statute, with knowledge that the offence had not been committed, the statute was stated as an act passed in the *second and third years* of the reign &c., the judgment was arrested. *Rex v. Biers and another.* 475

2. An act passed in a session of parliament, extending into two years of a reign, may in pleading be described as an act passed in a session holden in the two years. *Ibid.*

II. Public.

3. In addressing the Court in aggravation of punishment, upon a conviction for a nuisance, it is competent to the prosecutor to advert to provisions contained in an act relating to a private company, if such act contain a clause declaring it to be a public statute, though it be not referred to in any of the prosecutor's affidavits. *Rex v. Equitable Gas Company.* 759

III. Construction.

4. A company for effecting improvements in a town, is empowered by statute to take certain lands &c., upon giving notice and making compensation, the amount, if not agreed upon, to be ascertained by a jury; and if assessed at more than was offered, the company to pay "the

costs of the notices and precepts, and of summoning the jury and witnesses, *and also of the inquest.*" Held, that a party whose property was assessed at more than the sum offered, was entitled to his *general* costs attending the trial. *Rex v. Justices of the City of York.* 685

5. But not to the expenses of surveying. *Ibid.*

STEWARD.

See COPYHOLD.

STOCK IN TRADE, ASSIGNMENT OF.

See BANKRUPTCY, 1, 2, 3, 4.

SUBPŒNA.

See WITNESS, 2, 3.

SUGGESTION.

1. On the trial of an action upon a special contract, with the money counts, evidence is given of a special contract, but the jury find a general verdict for a sum (less than 40*s.*), being the precise amount which the plaintiff would have been entitled to recover under the count for money had and received: Held, that the defendant is not entitled to the entry of a suggestion on the roll, that the action was brought for a *debt* not amounting to 40*s.* in order to deprive the plaintiff of costs, under the provisions of a court of requests act. *Mansfield v. Brearey.* 471
2. The Court are bound by the record as returned by the undersheriff. *Ibid.*

SUMMONS.

1. Whether the service of a writ of summons, under 2 *Will.* 4, c. 39, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him

in that character,—so as to render him liable to a devastavit, if he pay debts of an equal degree with that sued for, between the service of the writ of summons and the filing the declaration, *quære*. 205

SURETY.

See ACTION—SETTLEMENT, 22—
WITNESS, 4.

SURRENDER.

And see COPYHOLD, 1, 10—SETTLEMENT, 5.

I. What shall amount to.

1. *A.* demises to *B.*, who underlets to *C.* In the middle of both terms it is agreed between *A.* and *B.* that *B.*'s tenancy shall cease, and between *A.* and *C.* that *C.* shall hold under *A.* for a longer term. This arrangement enures as a surrender from *B.* to *A.*, and a new demise from *A.* to *C.* *Rex v. Inhabitants of Banbury*. 292

SURVEYOR OF HIGHWAY.

See HIGHWAY.

TAXATION OF COSTS.

See ATTORNEY—COSTS—ECCLESIASTICAL COURT.

TENANT IN COMMON.

See EJECTMENT, 2.

TERMOR.

See ANNUITY, 1.

TITHES.

And see ENCLOSURE.

I. Evidence of Title.

1. The decisions against raising, as against a lay impropriator, a presumption of a release or grant of tithes, from continual non-payment of them, are so strong, that the Court

of Error in the Exchequer Chamber refused to overrule them, though dissatisfied with the ground upon which the decisions rest, and referred the parties to their remedy by writ of error in parliament. *Bayley v. Drever and others*. 885

2. Perception of the tithe of corn, is evidence of title to other rectorial tithes,—as hay. *Ibid.*
3. In debt for not setting out tithes, it is competent to the plaintiff to give evidence of the perception of the tithes of the lands in question, by parties not shewn to be in privity of estate with the plaintiff—and to produce leases of the tithes granted by those persons to former occupiers of the defendant's lands. *Ibid.*

II. Composition.

4. Tithes for which compositions have been entered into by the respective occupiers may be rated in the hands of the rector in one entire sum. *Rex v. The Justices of Sussex*. 263
5. Upon the refusal of the rector to pay such rate, the justices are bound, upon the application of the overseers, to issue their warrant for levying it; although such mode of rating be inconvenient to the rector and contrary to former practice. *Ibid.*

TITLE.

I. To Chattels.

See TROVER, 5.

II. To Real Estate.

See VENDOR AND PURCHASER.

III. To Tithes.

See TITHES, I.

TITLE DEEDS.

1. In an action by *A.* against *B.*, *B.* cannot object to the production of the title deeds of *C.* *Marston v. Downes & Wife, executrix, &c.* 861
2. Nor, though *C.* refuses to produce

them, can *B.* object to the reception of parol evidence of their contents.

Ibid.

TOLL.

I. Immunity from.

1. By ancient charters, the king, being seised of toll-praverse, granted to a dean and chapter, for themselves, and their freeholders and other men, that they should be quit of toll:—Held, that a copyholder, who makes beer for sale upon the premises holden by him of the dean and chapter, and within the liberty of the church, throughout which the dean and chapter possess jurisdiction by virtue of the charters granted to them, is exempt from the payment of tolls in respect of a cart laden with such beer. *Lord Middleton and others v. Lambert.*

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2. A *fortiori*, is he exempt from payment of tolls in respect of sheep, part of his farming stock on his copyhold, going to a fair to be sold.

Ibid.

3. Whether, if one of the *ecclesiastical* body had claimed to be free from toll in respect of *merchandise*, the charter would have been held to give to him such an immunity, *quære.*

Ibid.

II. Remedy for.

And see TROVER, 2, 3.

4. A canal act gives the company tolls for all goods carried along the canal; which tolls, if not paid upon demand, they are empowered to recover by action, or they may seize *the goods* or other things, in respect whereof such rates ought to have been paid *and the vessels laden therewith*, and detain the same until payment of such rates and all arrears due from the owner of the boats; and if *such goods* are not redeemed within seven days after the taking thereof, *the same* are to be appraised and sold as in case of

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a distress. Held, that this clause does not empower the company to sell the boats. Held also, that their right to seize is confined to the limits of the canal, and that therefore they are not authorized to seize goods after they have been landed. *Ibid.*

III. Demise of.

5. Whether a contract for the demise of tolls by the trustees of a turnpike road, signed by one only of two persons appointed by the trustees to the office of clerks to the trustees, is a valid demise under 3 Geo. 4, c. 126, s. 57, *quære.* *Lee v. Nixon and Davison.*

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TRANSCRIPT OF RECORD.

See ERROR.

TRESPASS.

See WITNESS, 1.

TRIAL.

See COSTS, VI.

TROVER.

I. Title of Plaintiff.

1. *B.* mortgages to *A.* certain leasehold coal mines, and barges, &c.: *B.* afterwards demises the mines, and assigns the barges to *C.*: *A.* may bring trover against *D.*, who tortiously seizes and sells the barges and part of the produce of the mines. *Fraser v. Swansea Canal Navigation.*

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II. Conversion.

2. The seizure and sale were for tolls claimed to be due to a canal company: Held, that no injury resulted to *A.* until the sale, and that therefore an action brought within six months of the sale, but more than six months after the seizure, was not barred by a clause in the canal act, limiting the commencement of

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actions for any thing done in pursuance of that act, to within six months after the fact committed. 391

3. *Seemle*, however, that in an action by *C.*, in respect of such seizure and sale the period of limitation would have run from the time of the original seizure, whether the action were framed in trespass or in trover. *Ibid.*

III. Justification.

4. *C.* having committed an act of bankruptcy after the seizure and sale, upon which a commission issued within two months of the seizure and sale: Held, that in trover by *A.* against the canal company, to recover the value of the barges and coals, the company could not set up the title of the assignees under the 72d section of 6 Geo. 4, c. 16, even supposing them to have passed to the assignees under that section of the act. *Ibid.*

TURNPIKE.

And see TOLL, 5.

1. The adjudication of the quarter sessions upon an appeal relating to an act done in pursuance of a local turnpike act, is final, and a mandamus does not lie to require that Court to re-hear such appeal. *Rex v. The Justices of the West Riding of Yorkshire.* 86

UNDER-SHERIFF.

See NEW TRIAL—SUGGESTION.

UNDERTAKING.

See AGREEMENT—GUARANTEE.

USURY.

I. What shall amount to.

1. A deed by which *A.*, in consideration of 200*l.*, grants to *B.* an annuity or rent-charge of 20*l.* a-year for sixty years, is not on the face of it usurious. *Ferguson v. Sprang.* 665

2. To raise the question of usury upon a declaration on such a deed, the defendant must plead an usurious contract, and thereby raise an issue of fact for the jury. *Ibid.*

3. The declaration is good upon demurrer. *Ibid.*

4. When it is a matter of calculation other than the very simplest, whether a contract is usurious, the Court will not look at it to see whether it is so; that is a question for the jury. *Ibid.*

5. The risk of the insolvency of the grantor of an annuity otherwise usurious, is not such a risk of the principal money as will operate to make such a grant valid. *Ibid.*

VARIANCE.

I. In Process.

1. A defendant taken upon a capias ad respondendum, is entitled to be discharged, if between the writ and the copy served upon him, there is a variance either in the sound or in the sense of the words. *Hodgkinson v. Hodgkinson.* 564
2. As where in a capias the address was to the sheriffs of *Middlesex*, and in the copy to the Sheriffs of *Middlesex.* *Ibid.*

And see AMENDMENT—EVIDENCE—SUGGESTION ON THE ROLL.

VENDOR AND PURCHASER.

See ARBITRAMENT, 1, 2—BANKRUPT, 2, 3, 4—CONTRACT.

I. Evidence of Contract.

1. By the conditions of a sale of two houses by auction, the purchaser is to pay a deposit into the hands of the auctioneer, and the vendor is to deliver an abstract of title within ten days. *A.* pays a deposit, signs an agreement as purchaser, and obtains a receipt from the auctioneer for the money paid, as for a deposit. The abstract not being delivered, *A.* brings an action against the auc-

ioneer for the deposit. Held, that the production of the receipt and of the conditions of sale, without producing the written contract signed by *A.* was insufficient. *Curtis v. Greated.* 449

II. Title.

2. The vendor of a leasehold is bound to shew the lessor's title to demise, unless it be otherwise stipulated in the contract of sale. *Souter v. Drake.* 40
3. No agreement to dispense with the production of the lessor's title will be implied from the circumstances of the term being nearly expired, the small value of the property, and the absence of any premium. *Ibid.*
4. In 1818, *A.* conveys Blackacre to *B.*, *B.* becomes bankrupt, and his assignees convey in 1833 to *C.* In 1824 *A.* had conveyed Blackacre to *D.* It is competent to *D.* in an ejectment brought against him by *C.* to shew that in 1818 *A.* had not the legal estate in Blackacre. *Doe d. Oliver v. Powell and Pyne.* 616
5. The Court upheld a title depending on a fine with proclamations, although the first proclamation had been made before the engrossing (or recording) of the fine. *Doe d. Fleming and others v. Ford and Wick.* 813

III. Rights of Vendee.

And see WARRANTY, 1.

6. If a vendee, after discovering the sale to be fraudulent, deals with the property as his own, he cannot recover the purchase-money, upon subsequently detecting further circumstances of the original fraud. *Campbell v. Fleming and Jones.* 834

VERDICT.

See CERTIORARI, 6, 7, 8—EVIDENCE, 12—SUGGESTION.

VESTRY.

I. Mode of voting in Vestries.

1. By a local act the inhabitants of the parish of *C.*, paying church and poor rates, were empowered to elect guardians of the poor. In the vestry act (58 Geo. 3, c. 69,) which regulates the mode of voting in vestries, there is a proviso that that act shall not affect the right or manner of voting in any vestry held by ancient usage, or by a special act. Held, that this proviso did not except the parish of *C.* from the operation of 58 Geo. 3, c. 69,—and that to bring a vestry within the exemption it must have a peculiar constitution. *Res v. Churchwardens of Clerkenwell.* 411

II. Oath of Vestrymen.

2. A local vestry act directs that vestrymen shall take an oath that they will faithfully execute the duties imposed in them, as vestrymen appointed in pursuance of that act, and that they are duly qualified according to the rate of qualification thereby prescribed. By a public vestry act, the constitution of the vestry is changed. Vestrymen elected under the new act cannot be required to take the oath prescribed by the former act. *Res v. St. Pancras.* 425

III. Eligibility of Vestrymen.

3. In parishes within the metropolitan police district, or in which the rated house-holders exceed 3000, persons to be eligible as vestrymen, and to be capable of acting as such within 1 & 2 Will. 4, c. 60, must be resident householders rated upon a rental of 40*l.* *Ibid.*
4. But it is not necessary that such rating should be in respect of property in their own occupation. *Ibid.*
5. So, as to eligibility in parishes not being within the metropolitan police district, or the city of London. *Ibid.*

6. So, as to capacity to act as vestrymen in such parishes, *semble*. *Ibid*.

IV. Election of Vestrymen.

7. In parishes which have adopted the vestry act of 1 & 2 Will. 4, c. 60, the number of vestrymen to be *lotted out* at the first election of vestrymen under that act, is, one-third of those vestrymen who, at the time of the election, were in *actual existence*,—not one-third of a complete vestry,—nor one-third of a complete vestry deducting from *such third* the number of the vacancies. *Ibid*.
8. A parish is not "divided into districts for ecclesiastical or other purposes," within 1 & 2 Will. 4, c. 60, s. 22, where a small portion of the parish is annexed to a chapelry created in an adjoining parish,—or where the parish has been, for the convenience of collecting the poor-rates, divided into four districts, which districts have been adopted by the returning officer of a borough (within which the parish is situate) for the purpose of taking the poll at an election for members of parliament. *Ibid*.

V. Adjournment of Vestry Meeting.

9. Where a meeting for the election of churchwardens takes place in the parish church, in pursuance of a notice that such meeting would be held at the parish church, and that in case a poll should be demanded the meeting would be immediately adjourned to the town-hall,—the chairman, upon a poll being demanded, may adjourn the meeting to the town-hall, although a majority of the voters present object to such adjournment. *Res v. The Archdeacon of Chester*. 413
10. The right of adjourning the business in progress at a meeting, is vested in the persons assembled, and not in the chairman. *Ibid*.

VOTING.

See MANDAMUS—VESTRY, 1.

WAGES.

See SETTLEMENT, 6, 7, 8, 12, 13, 14.

WARRANT OF ATTORNEY.

See ANNUITY, 2, 3, 4—PRACTICE, 2.

WARRANT OF COMMITMENT.

And see JUSTICES.

1. The return to a habeas corpus, directed to a gaoler, stated that the prisoner was received by him under a warrant of commitment, reciting a conviction under the act for the prevention of smuggling, (3 & 4 Will. 4, c. 53, which authorizes justices to amend their warrant of commitment,)—that on a subsequent day some person came to the gaol, took away the warrant, and left in lieu thereof another warrant, dated the same day, under the hands and seals of the same justices, but which contained no statement of its being a substituted warrant;—and that under this warrant he had since detained the prisoner: Held, that it did not sufficiently appear that the second warrant was substituted by the authority of the justices, and that the prisoner was therefore entitled to be discharged. *Res v. Elmy and Sawyer*. 733

WARRANTY.

1. A horse is sold with a warranty of soundness for twenty-four hours: Held, that mere knowledge of unsoundness by the seller does not vitiate the sale. *Bywater v. Rickardson*. 748
2. Certain rules were posted up at a repository for horses, regulating sales by private contract there: Held, that parties contracting at the repository having notice of the rules, impliedly adopted the terms of the rules. *Ibid*.

WAYWARDEN.

See HIGHWAY.

WIFE.

See AGENT, 1—BANKRUPT, 5—CON-
SPIRACY, 1—EVIDENCE, 26, 27—
FRAUD, 2.

WILL.

See BANKRUPT, 5, 6, 7—EVIDENCE,
2, 3, 4, 17, 18.

WINDOW

See LICENCE.

WITNESS.

And see EJECTMENT—EVIDENCE—
COSTS, VI.

I. Competency.

1. In trespass quare clausum fregit, a person claiming to be the owner of the locus in quo, may disprove the plaintiff's title. *Woolway v. Rowe.* 849

II. *Subpoena duces tecum.*

2. A witness brought into Court to produce a document, under a subpoena duces tecum, may be compelled to produce it without being sworn. *Perry v. Gibson.* 462

III. Attachment.

3. This Court has no power to grant an attachment against a witness for disobeying a subpoena, issued out of the Court of Quarter Sessions. *Rex v. Room.* 725

IV. Attesting Witness.

And see EVIDENCE.

4. In an action against *A.*, upon a promissory note, more than six years old, and which purported to be the joint and several note of *A.* and *B.*, and the signature of *B.* to which purported to be attested by *C.*; evidence of payment of interest within six years, by *B.*, is not sufficient to take the case out of the statute of limitations, unless the attesting witness is called, although it appears that *A.* signed the note as surety for *B.*, whose name had been previously subscribed to the note. *Wylde and another v. Porter.* 585

WORDS OF PRESENT DEMISE.

See LEASE.

WORK AND LABOUR.

See OVERSEERS.

WORKHOUSE.

See OVERSEERS.

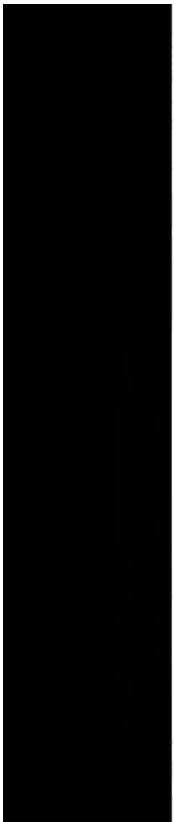
WRIT OF SUMMONS.

See SUMMONS.

WRIT OF TRIAL.

And see NEW TRIAL—SUGGESTION.

1. The judge of an inferior Court, to whom a cause is sent by writ of trial, cannot certify to deprive the plaintiff of costs, where less than 40s. is recovered. *Wardroper v. Richardson.* 839



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